Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2010

Leadership is a behavior, not a position

CASE LAW UPDATES
FIRST QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS

John W. Bizzack, Ph.D.
Commissioner

Department of
CRIMINAL JUSTICE TRAINING
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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

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Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – - 510 - SEXUAL ABUSE

Torian v. Com.
2010 WL 391851 (Ky. App. 2010)

FACTS: Torian was a state prison inmate. A prison employee, L.D., alleged that Torian came to her station in need of a "job." They went to a nearby bulletin board to discuss opportunities. While there, L.D. alleged that Torian touched her crotch. "She knocked Torian's hand away, told him not to put his hands on her, and called for assistance." Torian followed her into the station, later stating that he was confused and didn't know why she was upset. He was escorted from the room by another officer.

Torian was charged and convicted of First-Degree Sexual Abuse. He appealed.

ISSUE: Is a single physical contact, without overt force, sufficient to prove First-Degree Sexual Abuse?

HOLDING: No

DISCUSSION: Torian argued that the Commonwealth did not "prove the element of forcible compulsion." The Court reviewed the statute in question, KRS 510.110, and previous case law on the matter. The Court noted that "forcible compulsion exists only if sexual contact is caused by physical force, or threats thereof." The Commonwealth's case was that the "unwanted touching happened suddenly, and that afterwards L.D. was frightened because she inadvertently cornered herself in the guard station, with no exit except past Torian." No force was alleged in the initial touching and no physical contact happened thereafter.

The Court reversed the conviction on Sexual Abuse.

NOTE: Although not addressed in the case, this situation might have been appropriate for a charge of Harassment, instead.

PENAL CODE - 511 - BURGLARY

Lewis v. Com.
2009 WL 2568953 (Ky. App. 2010)

FACTS: On Jan. 3, 2006, Lewis entered a Louisville pharmacy and demanded OxyContin and another drug. He claimed to be armed with a gun. Police arrived during the robbery and arrested Lewis, at which time he was found to have a knife. He was charged with Robbery, Burglary and related charges. He was convicted of Burglary but not Robbery. Lewis appealed.

ISSUE: Is it necessary to order a person committing a crime in an open establishment to leave for it to be considered burglary, when the person remains after beginning the commission of the crime?

HOLDING: No

DISCUSSION: Lewis argued that he could not have been convicted of burglary because "his actions were perpetrated in a public place which he was never ordered to leave." The Court, however, noted that Bowling v. Com. stated that a "license to be on the premises terminates when one commits criminal acts."[1] The Court noted, however, that "taken to its logical end," every shoplifter could be effectively turned into a burglar. Pending further guidance by the Kentucky Supreme Court, the Court of Appeals ruled that the burglary charge was appropriate.

Maples v. Com.
2010 WL 567091 (Ky. App. 2010)

FACTS: In October, 2006, two Bell County homes were burglarized. In one, jewelry was taken and in the other, a firearm. The victim in the gun theft "launched an all-out campaign to recover" the weapon and told everyone he could about the missing gun. A friend reported to the victim that Maples was trying to sell a similar handgun. The men set up a sting. The victim's friend arranged to purchase the weapon, with the victim and another friend observing. The gun was transferred, but since Maples didn't have change, he also gave the men a bag of jewelry that was the proceeds in the other burglary. (The jewelry was worth about $2,000, but was given in place of the $5 owed to the buyer of the weapon.) The victim and his friends confronted Maples, who fled. He hid out and called friends to pick him up, but the friends "most unfortunately for Mr. Maples," were working with the Bell County authorities. Two officers intercepted Maples at the pick up location.

Maples was charged with Receiving Stolen Property and related offenses. He was convicted and appealed.

ISSUE: Is the issue of the operability of a stolen weapon (taken during a burglary) an affirmative defense?

HOLDING: Yes

DISCUSSION: In conjunction with other issues, Maples argued that because the Commonwealth did not prove that weapon was fully-functional, there was insufficient evidence to convict him. The Court noted that it was up to Maples to show that it was not operable, not for the prosecution to prove that it was.

After resolving other issues, Maples' convictions were affirmed.

PENAL CODE - 515 - ROBBERY

Bryant v. Com.
2010 WL 1005902 (Ky. 2010)

FACTS: Bryant was charged with the Murder and Robbery of White, along with related charges. On the night of the murder, Bryant had spent the evening smoking crack; he left his apartment to meet White to obtain more. Bryant had been trying to get someone to front him some more cocaine and later admitted that he left the house without money. Bryant admitted to stabbing White, but claimed it was in self-defense. (A witness to the murder disputed that, and was later threatened by Bryant with the knife.

[1] 942 S.W.2d 293 (Ky. 1997).

The witness followed Bryant and directed responding officers to his location, which was the original apartment, apparently.)

When officers entered the apartment, they found a knife (the murder weapon) under the bed. A twenty dollar bill was also found at the scene.

Bryant was indicted, convicted and appealed.

ISSUE: May Robbery be argued as a motive even without evidence or an actual or intended theft?

HOLDING: Yes

DISCUSSION: Despite any direct testimony that White took, or attempted to take, anything from White, the Court agreed it was a "fair, reasonable inference" on the part of the jury that the murder took place during a robbery. The circumstantial evidence was sufficient to conclude that Bryant was trying to get drugs from White without paying. The bill found at the scene could have indicated that Bryant went through White's pockets, although it could have also supported Bryant's assertion that it was proof that he wasn't trying to take anything.

The Court affirmed the conviction.

Hobson v. Com.
306 S.W.3d 478 (Ky. 2010)

FACTS: On July 11, 2005, Hobson broke into a truck and stole items, including credit cards and an OL. He used the cards at several Ohio Wal-marts and attempted to use it at a Wal-mart in Ashland. The clerk realized it was a stolen card and delayed the sale so she could report it to a manager. Officer Schoch (Ashland PD) was in the store on an "unrelated police matter," and was summoned by the manager. He approached Hobson, who identified himself as was indicated on the OL. "When challenged that he looked nothing like the person pictured on the license," he claimed to be the individual's cousin and that he had permission to use the card.

He agreed to accompany Schoch to the office to make a phone call to the owner of the ID, leaving behind all the merchandise at the checkout counter. Hobson then "suddenly bolted through the shopping cart door into the parking lot, and Schoch gave chase." They struggled and Schoch's ankle was badly broken. With the help of others, he was captured and arrested.

Hobson was indicted for Robbery and related offenses. He was convicted and appealed.

ISSUE: Does force used after a theft attempt has been abandoned turn the crime into a Robbery?

HOLDING: No

DISCUSSION: Hobson argued that he could not be charged with Robbery because "at the time he used force against Schoch there had been an interruption of the theft, he had abandoned the theft, and thus the use of force did not occur during 'the course of committing a theft.'" The Court noted that he was charged

with First-Degree Robbery only because of the injury to Schoch – the "force he allegedly used to accomplish the theft was the force used against Schoch."

The Court looked to earlier cases where the "use of force by the defendant did not occur prior to or contemporaneous with the attempted theft" but during the escape from the scene. Specifically, the Court looked at Williams v. Com., which was "squarely on point with the present case – the theft was unsuccessful, the use of force occurred during the escape phase after the stolen items had been abandoned, and after an expectation of accomplishing the contemplated theft had been given up."[2] The court reviewed two other cases, Mack v. Com. and Bumphis v. Com., as well.[3] The Court agreed with the trio of cases "to the extent they recognize that an act of theft extends through the thief's getaway attempt, or escape." In this case, at the point he used force, he "knew that his purpose had been foiled" as the "merchandise he intended to steal had long been left at the checkout counter." Hobson did not use force to accomplish the theft, but the "avoid arrest and prosecution."

The Court reversed the conviction. Since no instructions were given on other potential charges (such as Theft and apparently Assault in the 3rd Degree), the trial court was ordered to enter judgment in Hobson's favor on the remaining issues.

Hamm. v. Com.
2010 WL 1006279 (Ky. 2010)

FACTS: Hamm was accused of robbing several persons at gunpoint in Lexington, on February 7, 2006. The gun was stolen from the father of a friend. Hamm was captured near the scene, arrested and ultimately charged with robbery. He was convicted and appealed.

ISSUE: For a Robbery charge, is an inoperable antique weapon a deadly weapon?

HOLDING: Yes

DISCUSSION: Hamm argued that the weapon was a military relic that could not be fired, and thus could not be a deadly weapon under Kentucky law. The Court noted that the weapon "was not a toy gun; nor, was it a non-firing replica or facsimile of a gun." As such, an instruction on First-Degree Robbery was appropriate.

With respect to the show up, in which Hamm was identified, the Court agreed that:

> The determination of whether identification testimony violates a defendant's due process rights involves a two-step process.[4] "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive ." If they were not, the analysis ends and the identification testimony is allowed. If the pretrial identification procedure is suggestive, "the identification may still be admissible if `under the totality of the circumstances the identification was reliable even though the [identification] procedure

[2] 730 S.W.2d 935 (Ky. App. 1987).
[3] 136 S.W.3d 434 (Ky. 2004); 235 S.W.3d 562 (Ky. App. 2007).
[4] Dillingham v. Com., 995 S.W.2d 377 (Ky. 1999).(quoting Stewart v. Duckworth, 93 F.3d 262 (7th Cir.1996) and Neil v. Biggers, 409 U.S. 188 (1972)) .

> was suggestive .' [5] Determining whether, under the totality of the circumstances, the identification was reliable requires consideration of five factors enumerated by the United States Supreme Court in Biggers. The five factors are : (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation . This Court adopted these factors in Savage v. Commonwealth.[6].

In this case, the Court found that the Biggers factors were properly applied and weighed heavily in favor of the reliability of the identifications. The Court upheld the denial of Hamm's motion to suppress.

Hamm's conviction was affirmed.

Hill / Bonner v. Com.
2010 WL 1133231 (Ky. App. 2010)

FACTS: Hill and Bonner were arrested for First-Degree Robbery of three people in a vehicle in Louisville, witnessed by the officers. Both fled when confronted and were captured nearby. Two guns were found in the same area where the pair was captured.. Both were convicted and appealed.

ISSUE: Is the operability of a firearm used in a Robbery an affirmative defense?

HOLDING: Yes

DISCUSSION: Hill / Bonner argued that the Commonwealth failed to prove the weapons were operable and as such, he should have received a directed verdict. The Court noted that in Merritt v. Com.,[7] it had ruled that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him is" a deadly weapon. Although Merritt had been criticized, the Court ruled it was up to the Kentucky Supreme Court to overturn the earlier rulings. But in this case, the Court ruled that Hill / Bonner clearly had firearms in their possession. Further, in Thacker v. Com., the Court had ruled that proving operability was not required of the prosecution in a robbery charge.[8] However, it could be proved as an affirmative defense.

Hill and Bonner's convictions were upheld.

[5] Id.
[6] 920 S.W .2d 512 (Ky. 1995)
[7] 386 S.W.2d 727 (Ky. 1965); Kennedy v. Com., 544 S.W.2d 219 (Ky. 1976).
[8] 194 S.W.3d 287 (Ky. 2006)

PENAL CODE - 527 - FIREARMS

Gray (Giovanni) v. Com.
2010 WL 743827 (Ky. App. 2010)

FACTS: Gray (aka Giovanni) was arrested for unrelated charges in Louisville and found to have a firearm in his possession. He later stipulated that he was a convicted felon at the time. Gray was convicted and appealed.

ISSUE: Following the 2006 changes to KRS 503, are felons permitted to own weapons for self-defense?

HOLDING: No

DISCUSSION: Gray argued that KRS 527.040 was unconstitutional and that KRS 502.055 and .085 (new in 2006) changed the law and allowed convicted felons to possess firearms for self-defense. The Court, however, ruled that the statutes did "not expressly or impliedly grant convicted felons the right to 'go about armed' for the purpose of self-defense."

Gray also argued that the officer lacked sufficient cause to stop and frisk him. The Court found the facts more than sufficient, as he was encountered "in the early morning hours in a high crime area closely conversing with the suspect" the officer was seeking. Gray quickly left the scene when the officer approached, supporting the officer's belief that the two were engaging in a drug transaction.[9] In the alternative, Gray argued that Terry stops themselves were not permitted under the Kentucky Constitution. The Court declined to address those issues, however, as they had not be raised before the trial court.

Gray's conviction was affirmed.

PENAL CODE - 530 - UNLAWFUL TRANSACTION

Utterback v. Com.
2010 WL 392297 (Ky. App. 2010)

FACTS: Utterback was accused of Unlawful Transaction with a Minor when she had her minor son deliver contraband to her husband, while he was incarcerated. The son did not realize that an item he delivered to the jail did, in fact, contain contraband. Utterback was convicted and appealed.

ISSUE: For an Unlawful Transaction charge, must the minor know of the illegality of his/her action?

HOLDING: No

DISCUSSION: Utterback argued that since her son did not know he was participating in an illegal activity, that the elements of the offense were not met. The Court, however, noted that neither the statute nor case law required that the minor know of the criminal nature of his conduct. The son did, however, complete it.

[9] Illinois v. Wardlow, 528 U.S. 119 (2000).

The Court concluded that since the minor did, actually, participate in the activity and complete the illegal task, the statute was satisfied.

Utterback's conviction was affirmed.

NON PENAL CODE – 218A - FIREARMS ENHANCEMENT

Lee v. Com.
2010 WL 199402 (Ky. App. 2010)

FACTS: On July 6, 2004, KSP troopers "attempted to serve an emergency mental petition at Lee's residence" in Adair County. "Lee was not cooperative and even stated he wanted a 'shoot out' with police." Captain Hancock set up a command post and negotiated for ten hours. Eventually Lee surrendered, but not until he admitted he had guns in his home. Captain Hancock obtained an arrest warrant for Lee and a search warrant for his home.

During the search, a number of guns were found, including one sitting on the table next to the telephone Lee used during his negotiations. Only that weapon was proven to have been loaded at the time. KSP also located a large number of marijuana plans near the home. Lee was indicted on marijuana cultivation charges and that charge was elevated because of the proximity of the weapons.

Lee was convicted and appealed.

ISSUE: Does the proximity of operable weapons elevate a KRS 218A offense?

HOLDING: Yes

DISCUSSION: Lee was given the firearms enhancement available under KRS 218A.992(1)(a). This statute requires that the weapon be possessed "in furtherance of the offense" - in this case, the marijuana cultivation. One of the ways to prove that nexus is to prove that Lee was in actual or constructive possession of a gun when arrested. Although the evidence did not prove actual possession, there was a reasonable inference that Lee had constructive possession of the guns in his home. Further, Lee had "expressed his willingness to use his firearms against law enforcement." Lee argued that the guns were at some distance from the marijuana, which was outside.

In addition, Lee argued that only one of the weapons was proven to be loaded, but the Court found that an "unloaded weapon is not the equivalent of an inoperable one." There was nothing to indicate that the weapons were inoperable, although there was no proof put on that any but the handgun was loaded.

Lee's conviction was affirmed.

DOMESTIC VIOLENCE

Hunter v. Mena
302 S.W.3d 93 (Ky. App. 2010)

FACTS: Candice (Mena) and Hunter lived together in Louisville for about 18 months. Hunter's minor children and nephew (Christopher) also lived with them. Hunter discovered that Christopher and Mena "were involved in a romantic relationship" – and they left to stay with Christopher's mother, who was Hunter's sister. The next day, Hunter tried to convince Mena to return; she refused. . Hunter then, allegedly, stole Mena's purse, had his niece physically attack and harass her. He left the house. Mena went to officers working an unrelated incident nearby. The officers moved her to a local shelter, but when Hunter pursued her, she called her mother. Her mother picked her up and they returned to her mother's house in Indiana.

A few days later, Mena requested an EPO from Jefferson County. It was granted. A DVO hearing was held, resulting in the issuance of a DVO. An amended DVO was entered several days later. Hunter than appealed.

ISSUE: Does leaving the state temporarily to flee a relationship prevent a subject from filing for a DVO in Kentucky?

HOLDING: No

DISCUSSION: Hunter argued first that Mena's DVO could not be extended to protect Christopher. Due to the unusual nature of the relationships of the parties involved, and because Christopher's mother, who did not live in Kentucky and thus could not file as his "next friend" under the statute (which requires that a "next friend" be a resident of the state), the Court agreed that Christopher could not be covered by Mena's petition. (The Court noted that it did not believe the legislature had this situation in mind, and that it "more likely envisioned the protection of the child of a domestic violence perpetrator by the perpetrator's partner who was not related to the child.) As such, it struck provisions in the DVO protecting Christopher.

The Court, however, did not agree that the Family Court lacked jurisdiction since Mena has fled to Indiana and then returned to file the petition. The Court noted that she had been a resident of Kentucky and did not lose that status when she fled to Indiana. The Court noted that there is a difference between domicile and residence, and although she had temporarily changed her residence to her mother's home, there was no indication she intended to abandon her legal domicile and legal status as a Kentuckian. In fact, Mena went to two other Kentucky locations before being driven to her mother's house in Indiana. The Court agreed the Family Court had jurisdiction.

The Court also agreed that there was sufficient facts to support the issuance of the DVO, with Mena's and Christopher's testimony. Although Hunter provided conflicting evidence, the Court agreed that it is within the discretion of the trial court to "observe the parties and assess their credibility."

The Court reversed the part of the DVO that applied to Christopher but allowed the remainder to stand. (The Court noted that during the pendency of the action, Christopher had turned 18 and could presumably file an action on his own behalf, should he believe it to be necessary.)

Buddenberg v. Buddenberg
304 S.W.3d 717 (Ky. App. 2010)

FACTS: Buddenberg was the subject of an EPO taken out by his wife, on both her behalf and that of her children. When Buddenberg was not served by the original date for the hearing, it was rescheduled. At the subsequent hearing, the Court granted a DVO. However, during the time following the issuance of the EPO, Buddenberg apparently made telephone contact with his children, although the EPO directed him to have no contact. The trial court held him in contempt, and a motion was made to set aside the contempt. When that was denied, he appealed.

ISSUE: Do actions taken prior to actual service (or notice) of an EPO subject a person to contempt?

HOLDING: No

DISCUSSION: The Court noted that there was "no clear evidence in the record" as to when Everett was actually served with the EPO. Everett testified that he did not attempt to call his children after he was actually served. With that lack of evidence, the trial court could not find that he had, in fact, willfully violated the EPO. Further, a contact made by his mother after the EPO was served could not be imputed to Buddenberg, although the court recognized that such "orders are typically interpreted to preclude both direct and indirect contact, including contact by third parties." However, the order itself only applied to Buddenberg. (Further, their mother had previously told the court that she did not object to contacts from the grandparents.)

The Court vacated the contempt order.

DUI

Helton v. Com.
299 S.W.3d 555 (Ky. 2010)

NOTE: This case is a modification of an earlier decision.

FACTS: Helton was convicted of multiple counts of wanton murder and related charges, resulting from a car accident in which she was driving while under the influence of alcohol. At issue was the taking of a blood sample from her. This was done while she was unconscious at the hospital, at the request of responding Jessamine County deputy sheriffs. The sample tested at .16%. At trial, Helton moved for suppression, arguing that the taking of blood was in violation of KRS 189A.105(2)(b), but the Court found that her condition made her consent "statutory" under KRS 189A.103. She took a conditional guilty plea and appealed.

ISSUE: Is the Kentucky implied consent statute unconstitutional?

HOLDING: No

DISCUSSION: Helton argued that the two statutes were in conflict and that as a result, the deputies should have sought a warrant. The Court, however, noted that if a driver actually refuses the test, they have withdrawn consent, but that would subject them to other sanctions. "KRS 189A . 105(2)(b) comes into play by requiring the officer to obtain a warrant before testing the suspect when a motor vehicle accident results in a fatality, as is the case here, unless the blood test 'has already been done by consent'" The Court noted, that consent is the "default rule," or "statutorily implied consent" in that by driving in the state, a driver has given consent, unless explicitly revoked. A person physically unable to revoke is deemed "not to have withdrawn consent."

The Court then moved to her second argument, which is that implied consent testing is unconstitutional. The Court looked to Breithaupt v. Abram, in which the Court had held that the taking of a blood sample was a slight intrusion.[10] The closest case to the facts is Schmerber v. California, in which the Court had rejected non-search and seizure related arguments.[11] However, in Schmerber, the officers had other indicia of alcohol intoxication prior to forcing the test.

In the past, Georgia has held unconstitutional a similar statute that "allowed for testing of any person who had been involved in an accident resulting in serious injuries or fatalities."[12] However, Kentucky's case applies only when an officer has "reasonable grounds" to believe the subject has been driving under the influence, in contrast to Georgia's, which permitted it with "any sufficiently serious accident." "Nothing in the Kentucky implied consent statute allows it to be invoked merely because a person is involved in a serious accident" - "there must be some suspicion of driving under the influence before implied consent can be invoked."

The Court noted that "to pass constitutional muster, 'reasonable grounds' must equate at least to probable cause." Because no testimony was taken on that issue, no proof was taken "about what the police knew at the time of the accident that gave them reasonable grounds to require such a test," the Court did not rule on that issue. The Court agreed that if the officers had probable cause, the test was lawful, but since the "trial court did not engage in the whole analysis necessary," it was required to vacate the decision and remand the case for a new suppression hearing to address that issue.

Cowles v. Com
2010 WL 392006 (Ky. App. 2010)

FACTS: On August 8, 2007, Cowles was riding his motorcycle home after drinking with a friend. He was clocked by Trooper Garyantes (KSP) at the speed of 85 mph in a 55 mph zone. The trooper went in pursuit.

> When Cowles entered one of the busiest intersections in the county, he encountered two staggered vehicles in the two lanes in front of him. Cowles passed one vehicle and then switched lanes, without signaling, to pass the other vehicle. At this point, Garyantes' radar showed Cowles was traveling at 90 m.p.h. With his lights and siren still activated, Garyantes continued to pursue Cowles, who turned around and looked at him. Garyantes

[10] 352 U.S. 432 (1957).
[11] 384 U.S. 757 (1966).
[12] Cooper v. State, 587 S.E.2d 605 (Ga. 2003).

signaled for Cowles to pull over, yet Cowles instead turned into a residential area, where he traveled at approximately 45-50 m.p.h. in a 25 m.p.h. speed zone. At the top of a hill, Cowles pulled over, turned off his engine, and dismounted his motorcycle. Garyantes exited his patrol car and approached Cowles, noticing a strong odor of alcohol on him. Garyantes then conducted three field sobriety tests, which Cowles failed. Garyantes, who said Cowles admitted to consuming beer, described Cowles as uncooperative and verbally combative. Cowles was arrested and taken to Hardin Memorial Hospital, where a blood sample was drawn. Subsequent testing revealed a blood alcohol (B.A.) level of 0.22.

Cowles was charged with Wanton Endangerment 2nd degree, DUI, Speeding and related traffic offenses.[13] He was convicted and appealed.

ISSUE: May a DUI case be made without Intoxilyzer results?

HOLDING: Yes

DISCUSSION: Cowles argued that it was hearsay for the trooper to state who drew the blood at the hospital, and that it was not shown that a non-alcoholic substance was used to clean the skin prior to the blood draw. The Court looked to Matthews v. Com.[14] and agreed that a proper foundation was laid to introduce the evidence. The Court ruled that it was properly established that the blood draw was presumed to be regular. Further, the Court noted, there was sufficient evidence even without the blood to indicate that Cowles was intoxicated and that prior case law had supported DUI charges even in the absence of breath testing results.

Cowles's conviction was affirmed.

Com. v Lamberson
304 S.W.3d 72 (Ky. App. 2010)

FACTS: On December 17, 2004, Lamberson was indicted for DUI, 4th offense, following a traffic stop in Jefferson County. Previously, he had a 1990 DUI (with serious bodily injury) in Florida, a 2000 DUI conviction in Bullitt County and two prior DUIs in 2001 and 2002, in Jefferson County. The Court elected to rely on the three previous Kentucky convictions to enhance his current DUI to a felony. Lamberson had argued that Bullitt County had not verified his waiver of his right to be present at the time he took a guilty plea in 2000 - he was in a Missouri residential treatment facility at the time. (Instead, his attorney submitted his guilty plea, along with signed orders authorizing him to do so.)

The trial court found that suppression of the 2000 conviction was required by Tipton v. Com., which stated that it is **"**an abuse of discretion to accept a plea of guilty *in absentia* for any offense, such as driving under the influence, for which an enhanced penalty may be imposed for subsequent convictions."[15] The Commonwealth raised several arguments, to no avail. The Commonwealth appealed and the case was returned by the Court of Appeals to Jefferson County to determine whether Lamberson properly waived his right to be present in 2000.

[13] He was charged with First Degree, but instructions on both were properly given to the jury.
[14] 44 S.W.3d 361 (Ky. 2001).
[15] 770 S.W.2d 239 (Ky. App. 1989).

Following a subsequent proceeding, in 2008, the Commonwealth found that he did not waive his right to be present when he entered his guilty plea *in absentia* to the DUI offense in 2000. The Commonwealth again argued that since he did not object, in 2002, to the entry of a DUI 2nd offense, based on the 2000 plea, that he had waived the right to argue that later. Again, the trial court disagreed and found in Lamberson's favor, and again, the Commonwealth appealed.

ISSUE: Must an objection to the use of a prior DUI conviction (for purposes of sentencing enhancement) be made at the earliest opportunity?

HOLDING: Yes

DISCUSSION: The Court agreed that Lamberson was not even in Kentucky when the 2000 guilty plea was entered by his attorney. Further, it was undisputed that while he signed the guilty plea form and a "checklist of constitutional rights he could waive by entering a guilty plea," he did not give a "written waiver of appearance specifically required by RCr 8.28(4). As a result, Bullitt County should not have accepted the plea in 2000.[16] However, the Court continued, that did not end the analysis in this case, as Lamberson did not raise the issue when his two Jefferson County DUI offenses were enhanced because of the 2000 plea. The Commonwealth maintained that since conviction could have been enhanced under similar circumstances for purposes of PFO status, that the same should apply to enhancement of a DUI offense. (For PFO, the defendant "must challenge any underlying conviction at the first opportunity - in other words, before the enhanced conviction is entered - or forever waive the ability to challenge the validity of the prior conviction."[17])

The Court agreed with the Commonwealth that "there is no practical difference in challenging a prior conviction the Commonwealth seeks to use for enhancement purposes whether the prosecution occurs under KRS 189A.010 or KRS 532.080." Finding that Lamberson did not challenge his 2000 conviction at his 2001 case, the Court agreed that "he may not launch such an attack now."

The Court reversed the Jefferson County decision to suppress, and remanded the case for further proceedings.

ARREST

Neal v. Com.
2010 WL 890033 (Ky. App. 2010)

FACTS: On December 11, 2007, Officer Kirk (Clay City PD) responded to a possible DUI call. He found the vehicle in a parking lot but first observed Neal standing on the front porch of his apartment. Officer Kirk saw Neal put a small cooler down and reach into a pocket for a key. Officer Kirk approached and smelled the odor of an alcoholic beverage. Neal admitted he'd consumed several drinks on his way home, his eyes were "red, glassy, and blood-shot and … his speech was slurred." The hood of the vehicle was still warm.

[16] The rule had been amended in 1999 to require the form.
[17] Howard v. Com., 777 S.W.2d 888 (Ky. 1989).

Officer Kirk arrested Neal for Alcohol Intoxication, but he agreed to let Neal go inside to use the bathroom and call his girlfriend. However, he observed Neal take a "small bundle from his trouser pocket and slide it under the bed sheet." Kirk retrieved it, finding 100 Xanax pills, and Neal was charged

At trial, Neal argued the officer lacked probable cause to arrest him, and that as such, the drugs were inadmissible. The trial court disagreed. Ultimately, Neal took a conditional plea and appealed.

ISSUE: Is the front porch a public place for purposes of an AI arrest?

HOLDING: Yes

DISCUSSION: Neal argued that Officer Kirk could only lawful arrest him for AI if the violation had been committed in Kirk's presence. Since that was not the case, he argued the arrest, and subsequent discovery of the pills, was unlawful. The Court concluded that a front porch, although on private property, was a public place under the meaning of the statute in question, pursuant to Quintana v. Com.[18] There was nothing on the front porch that would have impeded the public's ready access to his front door - "no fence, no gate, no dog, no signage." Since the Court found that arrest lawful, the evidence subsequently collected was admissible.

Neal's plea was affirmed.

Ball v. Com.
2010 WL 1005944 (Ky. 2010)

FACTS: On August 5, 2007, at about 1 a.m., Deputy Allison (Bath County SD) responded to a disturbance call at a local BP station, which was closed. As he arrived, he spotted a person later identified as Ball walking through the parking lot and entering what was later determined to be his own property. There Ball took a drink, poured some of the liquid on the ground and took another drink. Allison intended to leave, but then saw that Bath was sitting on his front porch drinking a beer. He apparently believed that to be illegal (Bath is dry) so he went back. He got out of his car to talk to Ball and another individual Albertson, who was also sitting on the porch steps.

> As Allison questioned the men, he noticed that Ball smelled of alcohol, that his speech was slurred, that he was uncooperative in answering questions, and that his answers were "nonsensical." Based upon these factors, Allison concluded that Ball was intoxicated. Although Ball was on his own porch, according to his suppression hearing testimony, it appears that Allison believed that the appellant was in violation of the public intoxication statute, KRS 222.202 .

Ball decided he needed a cigarette and stated he was going inside. Allison told him to stay where he was, because he'd made the decision to arrest Ball - although he had not yet told him so. Ball went into the house and Allison followed him, attempting to handcuff him. "Ball pulled away, took a few steps back, and removed a knife from his back pocket." The ensuing struggle took them "out the front door, off the porch, and into the yard." Both men were injured and Ball was taken to the hospital. He was indicted for wanton endangerment and assault, as well as PFO.

[18] 276 S.W.3d 753 (Ky. 2008)

Ball moved for suppression, arguing that Allison had illegally entered the residence. At a hearing, the court returned a confusing order. When asked to clarify, the Court "reversed itself" and denied the motion. Ball was tried and convicted of third-degree assault and PFO, and appealed.

ISSUE: May a subject being arrested use force to resist the arrest if they believe the arrest is unlawful?

HOLDING: No (but see discussion)

DISCUSSION: Among other issues, the Court discussed the "imperfect self defense" argument - that Ball was allowed to use force to defend against Allison's entry and allegedly illegal arrest.

The Court continued:

> An examination of KRS 503 .120(1) discloses that it contains no reference to its availability when, during the course of resisting arrest, the actor uses physical force upon an officer. On the other hand, KRS 503.060(1) specifically addresses this situation. Under established rules of statutory construction, "when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails"[19]
>
> Because KRS 503.060(1) specifically addresses the use of force by a person against a police officer in the course of an arrest, it follows that it must prevail over the more general statute, KRS 503.120(1) . Moreover, because 503.060(1) does not contain an exception for a wantonly held belief by an arrestee that he is entitled to use self-protection against an arresting officer, the imperfect self-defense provisions contained in KRS 503.120(1) are not applicable under the circumstances described in KRS 503.060(l)[20] .

Since there was no indication Allison was using unreasonable force, Ball had no legal right to resist that arrest, even if it proved to be unlawful. With respect to the statements he made inside the house and pulling the knife, the Court noted that Ball had pointed to no specific statements and would not address that issue. With respect to the knife, the Court noted that even if the entry and arrest were unlawful, the pulling of the knife was not the "fruit" of those illegalities. The knife was not the result of the "primary taint."

After resolving several unrelated issues, the Court affirmed Ball's conviction.

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[19] Land v. Newsome, 614 S.W.2d 948 (Ky.1981) ; Com. v. Phon, 17 S.W .3d 106 (Ky. 2000); Withers v. University of Kentucky, 939 S.W .2d 340 (Ky. 1997) .

[20] See also Baze v. Com., 965 S.W.2d 817, 822 (Ky. 1997) (holding that even though a defendant may believe that deadly physical force is necessary to protect himself against unlawful force by another, the use of such force is not justifiable when the defendant is resisting arrest by a police officer recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest even though the arrest is unlawful) and Stopher v. Com. , 57 S.W. 3d 787, 803 (Ky. 2001) ("There is no right to use self-defense during an arrest. ") .7

SEARCH & SEIZURE – WARRANT

Com. v. Pride
302 S.W.3d 43 (Ky. 2010)

FACTS:

On November 9, 2006, KSP requested a search warrant for Pride's residence. "The search warrant affidavit, given by Detective Sean McKinney, stated the following in support of the warrant:"

> *On the 6th day of September, 2006, at approximately 11:00 a.m., affiant received information from: A Confidential Source of illegal narcotic activities in the Commonwealth of Kentucky. The Confidential Source stated that he knew a man by the name of Leslie Pride and that Pride was selling marijuana. The Source stated that Pride lived in Union County and told him that he had 240 female marijuana plants and priced the marijuana at $600.00 per quarter pound. The Source stated that he knew Pride from previous employment and that the information received was told to him by Pride last summer (2005). The Affiant states that the Confidential Source has provided information on at least 3 marijuana investigations and that that information has resulted in ongoing criminal investigations and controlled purchases (not related to Pride). The Confidential Source has proven to be a reliable source of narcotics related information to the Kentucky State Police.*
>
> *Acting on the information received, affiant conducted the following independent investigation: Affiant states he and Det. Matt Conley through vehicle and driver's license checks confirmed that Leslie Pride lived in Union County, KY and resided at 681 SR 365 in the Sturgis area. Affiant states that on November 7, 2006 Det. Conley and Det. Louis Weber drove back to the residence and obtained information from it and two comparison homes in the area for a utility records subpoena. Affiant states that he went to the Union County PVA Office and obtained property cards and information on three residences for comparison. Affiant states that he chose the two comparison homes based on geographic location, same utility company service, and being similar structures in both construction and size. Affiant states that he served a subpoena on Kentucky Utilities on November 7, 2006 for the utility records on all three residences.*46 Affiant states that on November 8, 2006 he received faxed copies of those records from Kentucky Utilities. Affiant states that he provided those records to Det. Weber for review and graphing. Det. Weber is assigned to the Kentucky State Police Drug Enforcement/Special Investigations Section and has investigated several dozen indoor marijuana grow operations and has created a graphing system for the utility records. Affiant states that Det. Weber prepared the graphs for 2005 and 2006, and prepared a structural comparison on all three residences. Det. Weber concluded that based on the extremely high electric usage and indicative spiking of electric at 681 ST RT 365, it was his opinion that the records were consistent with an indoor marijuana grow. Det. Weber consulted with retired KSP Det. Mark Moore on November 9, 2006 regarding this investigation. Det. Moore, who is now assigned as a KSP Drug Task Force Officer, was assigned to the KSP Marijuana Operations Section from 1995 until his retirement in 2003. Det. Moore was provided copies of the graphs and structural comparison worksheet. Det. Moore also concluded that based on his experience and*

training, that the extremely high electrical usage was indicative of and consistent with an indoor marijuana grow....

Affiant further states that he has checked Leslie Pride's criminal history and determined that he was charged and convicted in Union County in 1995 for Trafficking in a Controlled Substance 1st Degree and sentence to 10 years. Affiant further states that Pride was charged and convicted in Union County in 1995 for 2-counts of Trafficking Controlled Substance 1st degree and possession of a handgun by a convicted felon. Pride was sentenced to another 10 years to run concurrent with the previous indictment....

Pride's home was searched and a large amount of marijuana along with other items related to marijuana trafficking were found. Pride was indicted and moved for suppression, arguing, among other issues, that the testimony by a KU energy analyst on his behalf concerning the normal use of electricity for the area should have been given credibility. Further, the testimony from a KSP detective, that "had he known about the number of appliances" at Pride's home, he would have changed his opinion concerning the likelihood of a marijuana growing operation there, also fatally flawed the warrant. (The opinion also noted that there were issues with the houses used to compare electricity uses, one having been vacant for several months and the other having only two elderly residents - compared to Pride's home with five residents.)

The trial court denied the motion and Pride took a conditional guilty plea. She appealed. The Court of Appeals reversed the trial court decision, finding that the CI's information was stale and the electricity comparison was flawed. The Commonwealth appealed.

ISSUE: May electrical usage comparison be used to support a search warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court reviewed the standard for making this type of decision, the process outlined in Illinois v. Gates.[21] However, the Court of Appeals used the process in Ornelas v. U.S., which was more properly used for Terry and warrantless search cases.[22] Gates required the Court to look at the totality of the circumstances within the four corners of the affidavit, not looking to extrinsic evidence. The Court noted that "suspicious electricity usage coupled with other information" can be enough for a warrant. The Court was unwilling to hold it "necessary for the police to undertake the kind of comprehensive investigation suggested by [Pride] before electricity records may be used." The process suggested, "forcing the police to interview the occupants of comparison houses, determine their lifestyle, and then determine in detail the appliance located in each house, could alert suspects to the investigation, and allow them time to destroy evidence." The Court agreed that the records indicated that the electricity usage overall at the Pride home was higher, but also that there were spikes in the usage "which were indicative of a marijuana growing operation in Detective Weber's experience." Further, the affidavit apparently included specifics of the actual data.

The Court found the warrant valid and reversed the decision of the Court of Appeals.

[21] 462 U.S. 213 (1983); See also Beemer v. Com., 665 S.W.2d 912 (Ky. 1984).
[22] 517 U.S. 690 (1996).

Ellenberger / Riley v. Com.
2010 WL 392314 (Ky. App. 2010)

FACTS: On Oct. 4, 3007, at about 11 p.m., Det. Mighell (Marshall County SO/Pennyrile Narcotics Task Force) requested a search warrant. The address given for the subject property was 1590 Olive-Hamlet Road, in Benton. The affidavit gave a very specific and detailed description of the property. However, the subject property, and the property actually searched, was 1594. The officers did not find the sought-after anhydrous ammonia or tanks but did find multiple other items related to methamphetamine. Ellenberger and Riley were there and both were arrested on Trafficking and related offense.

Both filed for suppression, which the trial court denied. Both took conditional guilty pleas and appealed.

ISSUE: Is a mistake in an address fatal to a warrant?

HOLDING: No

DISCUSSION: The officers indicated, and the court agreed, that the mistake in the address was a "mere typographical error." There was no indication that the incorrect address "led to confusion in serving the search warrant" or that it was done to somehow deceive the judge. The officer who obtained the warrant was also the "executing officer," so "he was aware of which property was to be searched and a mistaken identity was unlikely."[23] The Court also agreed that leaving off the name of the county did not invalidate the warrant.

Finally, the Court agreed that the warrant provided sufficient probable cause, as it was based in part upon a representation by two officers that they detected the odor of anhydrous coming from the house, which was not a farm (where such ammonia might be legally used). They heard "the clanking of metal tanks." Neighbors had complained about "unusually large amounts of traffic around the residence at unusual hours," which Det. Mighell then confirmed personally.

Both pleas were affirmed.

SEARCH & SEIZURE – CONSENT

Piercy v. Com.
303 S.W.3d 492 (Ky. App. 2010)

FACTS: On February 19, 2007, Detectives Russ and Coomer (Louisville Metro PD) were working on a narcotics investigation involving Piercy and his son. They had done surveillance on the home the men shared but no suspicious activity had been observed. On the date in question, however, they had spotted Piercy leave his home and get into his van, which had an expired license plate and a cracked windshield. As Piercy pulled out, Det. Coomer stopped him. Det. Russ entered the alley from a side street and later testified that he saw Det. Coomer's emergency lights. Piercy later stated that that he was not operating the vehicle, but simply unloading materials. The officers pulled in front of him and behind him and approached him on foot.

[23] U.S. v. Durk, 149 F.3d 464 (6th Cir. 1998)

Piercy produced his license and registration upon request. The officers testified that they explained the complaints to Piercy and that they wanted to clear up the matter. Det. Coomer asked for consent to search and was denied. When Det. Russ determined there were no warrants, Det. Coomer told Piercy he was going to have his drug dog check the van. The dog alerted on Piercy and Det. Coomer found marijuana in Piercy's pocket. The dog also alerted on the van and marijuana was located inside the van. Det. Coomer asked if he could search the residence. Piercy stated he wanted to call his lawyer and walked toward the house, as the officers had taken his cell phone. The officers followed him inside. (Det. Cooper later stated that Piercy had given consent.) The officers smelled marijuana inside. The detectives sat at the table and filled out a consent to search form, which ultimately, Piercy declined to sign. He was finally allowed to call his attorney. While waiting for the attorney, Det. Coomer began to fill out a search warrant affidavit. Piercy's attorney arrived in about 15 minutes. She conversed with the officers but never asked them to leave. Other officers arrived, Coomer left, and then returned with the search warrant.

Drugs and related items were found during the search, and Piercy was charged with trafficking in marijuana and a controlled substance, and assorted other charges. He moved for suppression, which the trial court denied. Piercy took a conditional guilty plea and appealed.

ISSUE: May a subject's actions constitute consent?

HOLDING: Yes

DISCUSSION: First, Piercy argued that he was seized when the officers approached him and blocked in his vehicle. The Court, however, determined the "investigating officers had a reasonable, articulable suspicion that Piercy was about to drive a vehicle with expired tags." As such, the stop, if it was a seizure, was justified under Terry. The officer stated that Piercy did move the van, and was inside the van when he was stopped. Piercy has also told the officers that "he could not stay and had to leave because he was a hurry" – presumably in the vehicle. As such, although the Court disagreed the encounter was consensual, it still found it to be legal.

Piercy did not challenge the search warrant itself, but instead argued that he did not consent to the officers' entry. The Court noted that the trial court had determined that the entry was with consent, and the Piercy's "non-verbal conduct" – opening the door and allowing the officers to come inside and sit at his table - was acceptable.[24] Once the officers detected the marijuana, the officers had sufficient cause to obtain the warrant.[25] Once the Court agreed that the officers were properly in the home, the Court found that they had a right to be where they could smell the marijuana, and of course, they immediately recognized it as contraband. They properly obtained a warrant at that time. As such "all three requirements for the plain view/smell doctrine were met and Piercy did not have a privacy interest in the smell emanating from his residence."

The Court affirmed the denial of the suppression motion and Piercy's plea.

[24] U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004).
[25] Cooper v. Com., 577 S.W.2d 34 (Ky. App. 1979).

Young v. Com.
2010 WL 323120 (Ky. App. 2010)

FACTS: On the night in question, a Morgan County service station was burglarized. Young was working as a night watchman at the property next door. Video indicated the perpetrator wore a pillowcase over his head, and a pillowcase was found nearby. While officers were investigating, Young told the officers he'd seen a white vehicle driving away, spinning its tires. Officer Perkins, however, noticed bed linens that matched the pillowcase at the scene in Young's vehicle and also identified suspect shoe prints as being possibly from a Nike shoe. Following up, officers went to Young's home and confirmed the linens were in the car. They knocked on the door. Young later disputed that he gave permission for the officers to enter, as they claimed.

Once inside, the officers glanced around. They seized cigarettes (matching the brand stolen in the burglary), a pair of shoes and a plaid shirt, all in plain view. Young was charged, and moved for suppression, arguing the seizure was unlawful. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May officers inside a home on consent seize incriminating items in plain view?

HOLDING: Yes

DISCUSSION: The Court first reviewed Young's assertion that is vehicle was unlawfully impounded. The Court, however, agreed it was appropriate to impound a vehicle when officers have probable cause that the vehicle contained evidence of a crime and that the evidence might be lost or destroyed if the vehicle is not immediately seized."[26] The Court also agreed that the trial court properly applied the precepts of plain view and gave more credibility to the officers that they had permission to enter the home. Because the officers were lawfully inside, saw items that were immediately incriminating and were lawfully where those items were located, the seizure was also lawful.

Young's plea was upheld.

SEARCH & SEIZURE – RUSE

Allen v. Com.
2010 WL 199427 (Ky. App. 2010)

FACTS: On January 31, 2008, Officer Patrick (Lexington PD) was on patrol and responding to complaints of narcotics trafficking at a specific address. He made contact with, and eventually arrested, a subject that left the suspect address, who was in possession of crack. Officer Patrick requested assistance to do a knock and talk at the address. He was familiar with the residence, occupied by Allen, and knew it to be a crack or smoke house. The officers approached and Patrick knocked, identifying himself as "Chris." A female opened the door and Officer Patrick shined his flashlight inside and immediately saw Allen about five feet away with a crack pipe in his hand. Officer Patrick entered and arrested him, and found more crack cocaine and cash.

[26] Cardwell v. Com., 639 S.W.2d 549 (Ky. App. 1982).

Allen was charged and requested suppression. When that was denied, Allen took a conditional guilty plea to a possession charge and appealed.

ISSUE: Is using a ruse in order to get a subject to open a residence door permissible?

HOLDING: Yes

DISCUSSION: Allen argued that Officer Patrick's use of a ruse to enter (using the name Chris) required suppression of the evidence found. He argued consent to enter was not voluntary because the ruse was effectively coercion. The Court looked to Adcock v. Com., in which the officer misrepresented himself as a pizza deliveryman to get the door open for a valid search warrant.[27] The Court agreed that the ruse was appropriate under the circumstances, as simply a means to get the door open. As soon as it was opened, the evidence was in plain view.

Allen's plea was affirmed.

SEARCH & SEIZURE – ABANDONED PROPERTY

Watkins v. Com.
307 S.W.3d 628 (Ky. 2010)

FACTS: On November 18, 2006, Officer Atkinson (Elkton PD) saw Watkins speeding through Todd County, in excess of 30 miles over the speed limit. He tried to stop the vehicle but Watkins sped away. "After what was apparently a relatively short, high-speed chase, [Watkins] spun out in the median of the highway and blew out a tire." He got out and tried to run away. Officer Atkinson called for backup and officers assisted in Watkins' capture. When he learned Watkins had been caught, Officer Atkins returned to Watkins's vehicle. Chief Marklin, who had stayed with the vehicle, learned that the "vehicle was owned by an unknown female in another town." Chief Marklin turned off the vehicle ignition.

> Before having the vehicle towed, the officers conducted a search of both the interior of the car, as well as the trunk. In the trunk, they discovered marijuana and crack cocaine inside a red and white cooler. Therefore, the officers considered the search of the vehicle to be an inventory search prior to the arrival of the tow truck. Also, they were fulfilling a policy of the Elkton Police Department to tow all vehicles that are stranded on the 'travel portion' of the roadway.

Watkins moved for suppression, but the trial court concluded that he "lacked standing to challenge the search since he had abandoned the vehicle." It also found that the "search was properly conducted pursuant to an inventory exception to the warrant requirement."

Watkins gook a conditional guilty plea to numerous charges and appealed. The Court of Appeals affirmed and he further appealed.

ISSUE: Is a vehicle stranded (rather than parked) by a fleeing subject considered abandoned?

[27] 967 S.W.2d 6 (Ky. 1998).

HOLDING: Yes

DISCUSSION: The Court chose to address the issue as one of an expectation of privacy with respect to abandoned property.[28] The Court found it clear that Watkins had abandoned the vehicle, because 1) it was owned by someone else, 2) he'd been in a high speed pursuit ending in damage to the car and he left the car running and with incriminating evidence in the trunk. It stretched "the imagination to the breaking point to believe that the fugitive [Watkins] would have returned to the disabled vehicle, changed the tire, and driven away."

Further:

> Leaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property. When one or more persons are fleeing and evading law enforcement officers, who are in hot pursuit, and the car is stopped or becomes disabled and all occupants flee from the vehicle, that vehicle is considered abandoned and may be subject to a warrantless search.

Watkins's plea was upheld.

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

Mash v. Com.
2010 WL 1005903 (Ky. 2010)

FACTS: The investigation against Mash, in McCracken County, started with tips from two incarcerated informants. One of the two made a phone call to set up a sting and officers tracked the transaction. Det. Riddle approached when Mash arrived at the location of the transaction and identified himself. Mash appeared nervous and "stated he was there to see Dike." Upon being asked, Mash denied having weapons. Riddle attempted to pat him down and Mash pulled away. "Detective Riddle had to hold onto him to keep him still." The officer felt a large plastic baggie and a wad of currency, that he later testified he was 99% sure was cocaine - he was correct. Riddle arrested Mash, gave him Miranda rights and transported him.

Det. Sgt. Carter (McCracken County SO) questioned him at the jail, gave him Miranda again and then took him to the sheriff's office. He testified that Mash admitted that he intended to exchange cocaine for sex. The deputies got a search warrant for Mash's home, and eventually, for his brother's home. They found a great deal of cocaine but Mash stated it was for personal use.

Mash was convicted of Trafficking and related offenses, and appealed.

ISSUE: Is a search incident to arrest made just prior to the actual arrest, but contemporaneous with it, permitted?

HOLDING: Yes

[28] California v. Greenwood, 486 U.S. 35 (1988).

DISCUSSION: Mash argued that "Detective Riddle's warrantless pat down of [Mash], and his emptying [Mash's] pockets" violated the Fourth Amendment." The Commonwealth argued it was a legitimate search incident to arrest. The Court agreed that "the tips, coming as they did from known informants, contained 'sufficient objective indicia of reliability.'" The two tipsters came forward independently and Mash was clearly familiar enough with one of them to know where she lived by her first name.

Further:

> As Detective Riddle had the legal and constitutional authority to arrest [Mash], it follows that his search of [Mash's] pockets was a legitimate search incident to arrest. While [Mash] insists that a search incident to a lawful arrest must logically occur after the arrest, he admits his position is contrary to the rulings of both this Court and the United States Supreme Court.[29] It is immaterial whether police choose to search immediately after or prior to arresting a suspect. "A warrantless search preceding arrest is reasonable under the Fourth Amendment so long as probable cause to arrest existed before the search, and the arrest and the search were substantially contemporaneous."

Mash also argued that Sgt. Carter's testimony about how much cocaine would constitute trafficking was improper. The Court noted that:

> Contrary to Detective Carter's testimony, possession with the intent to transfer does not fall within the definition of trafficking pronounced in KRS 218A.010(40) . "Traffic" is defined as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." "Noticeably absent from this statutory definition" is "[possess] with the intent to . . . transfer," the language used by Detective Carter.[30] Detective Carter announced an additional form of liability-possession with intent to transfer-on which the jury was not permitted to convict .

Unfortunately, the Court concluded that his testimony was inadmissible, but fortunately, concluded that his misstatement of the law did not unduly prejudice the jury. The Court deduced:

> … that the jury agreed with the Commonwealth that Appellant intended to trade cocaine for sex. Such an exchange clearly falls within the meaning of "sell" as defined in the jury instructions: "to dispose of a controlled substance to another person for payment or other consideration." (Emphasis added) .4 It also fits the substantially similar statutory language : "to dispose of a controlled substance to another person for consideration . . . ... KRS 218A.010(36) . The jury likely found that Appellant intended to dispose of the cocaine to Olivia Dike in exchange for "other consideration."

Mash's conviction was affirmed.

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[29] See Rawlings v. Kentucky, 448 U.S . 98 (1980)
[30] Com. v. Rodefer, 189 S.W.3d 550 (Ky. 2006).

SEARCH & SEIZURE - GOOD FAITH

King v. Com.
302 S.W.3d 649 (Ky. 2010)

FACTS: On October 13, 2005, Lexington police were doing a "buy bust" operation. They arranged for a CI to purchase crack from a street dealer. Following the sale, an undercover officer gave a signal for officers to "move in and make an arrest." The undercover officer "told officers to hurry, in order to keep the suspect from entering an apartment." As Officer Cobb arrived, a radio transmission stated that the suspect had entered the "back *right* apartment." However, because they were no longer near a radio, Officer Cobb and his companions did not hear the transmission but they did hear a door slam. The officers detected burning marijuana in the breezeway, coming from the back *left* apartment. The strong odor gave Cobb reason to believe that the "left apartment door had been recently opened" but he didn't know for sure which door he had heard close.

Det. Maynard knocked loudly on the left door and announced "police." They heard movement inside and thought evidence "was about to be destroyed." They forced entry and officers did "an initial protective sweep looking for the original suspect." They found three people, Washington, Johnson and King. Johnson was smoking marijuana and the officers saw marijuana and powder cocaine in plain view. They also found crack cocaine, scales, $2500, three cell phones and other paraphernalia. Eventually they realized the error, entered the right apartment and arrested the initial subject.

King and the others argued that the entry was unlawful and the evidence should be suppressed. The trial court agreed King (a non-resident) had standing, but the court stated that the smell of marijuana and the lack of response to the knock, along with the movement, "created the requisite exigent circumstances to justify a warrantless entry."

When that was suppressed, King took a conditional guilty plea and appealed. The Court of Appeals ruled that the entry was not justified, but that the police "did not create the own exigency because they did not engage in deliberate and intentional conduct to evade the warrant requirement."[31] The Court found a good faith exception, however, and affirmed the plea. King further appealed.

ISSUE: Does the Leon good faith exception apply only to warrant cases?

HOLDING: Yes

DISCUSSION: All parties agreed that the "smell of burning marijuana created probable cause, which would have been sufficient for the police to obtain a warrant to search the back left apartment." Because they didn't get a warrant, however, the Court had to look for possible exigent circumstances.

The Commonwealth first argued that the entry was justified under hot pursuit, but the Court noted that an "important element of the hot pursuit exceptions is the suspect's knowledge that he is, in fact, being pursued."[32] There was no indication that the original drug dealer knew that he was being pursued.

[31] U.S. v. Chambers, 395 F.3d 563 (6th Cir. 2005)
[32] U.S. v. Santana, 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 294 (1967).

"Nothing in these circumstances created an exigency that would have made it impracticable for the police to post officers in the breezeway and obtain a warrant."

The Court then looked to imminent destruction as a possibility. The Court noted that "odor alone is generally an insufficient basis for the warrantless search of a home based on imminent destruction of evidence."[33] Odor might be enough to justify a warrant, however, and can justify the warrantless search of a vehicle.[34]

With respect to the sounds of movement, the Court assumed "for the purpose of argument that exigent circumstances existed, and proceed to the more important question of whether police created their own exigency." The Court noted there is a "well established principle that police may not rely on an exigent circumstance of their own creation."[35] The Court looked to U.S. v. Duchi for the test for a "police-created exigency."[36] - focusing on "the reasonableness and propriety of the investigative tactics that generated the exigency." In U.S. v. Gould, the Court employed a two part test: "first whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement, and second, even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement."[37] Chambers required "some showing of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement."[38]

The Court therefore formally adopted the two-part test.

> First, courts must determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry."[39]

The Court found no indication of bad faith, but the Court did find that it was "reasonably foreseeable" that knocking and announcing might create an exigent circumstances - the destruction of evidence.

> When the imminent destruction of evidence is a concern because a suspect has become aware of police presence, the primary distinction is the manner by which the suspect gained that knowledge. Where police are observing a suspect from a lawful vantage point, and the suspect sees police, then the exigency is generally not police-created . But where police unnecessarily announce their presence, and this creates the fear that evidence will

[33] Johnson v. U.S., 333 U.S. 10 (1948)
[34] Cooper v. Com., 577 S.W.2d 34, 37 (Ky. 1979), overruled on other grounds by Mash v. Com., 769 S.W.2d 42 (Ky. 1989).
[35] U.S. v. Chambers, 395 F.3d 563 (6th Cir. 2005);
[36] 906 F.2d 1278 (8th Cir. 1990).
[37] 364 F.3d (5th Cir. 2004).
[38] See also Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002).
[39] Gould, supra.

be destroyed, police have created their own exigency, and cannot rely on the fear of evidence being destroyed as a justification for a. warrantless entry.[40]

Finding the entry unjustified, the Court then looked at whether good faith was appropriate, but held that the "Leon good faith exception is "clearly limited to warrants invalidated for lack of probable cause" and does not create a broad good faith exception for any illegal search."[41]

The decision of the Court of Appeals was reversed, as was the denial of King's motion to suppress. The case was remanded to Fayette County.

SEARCH & SEIZURE - INEVITABLE DISCOVERY

Hunt v. Com.
304 S.W.3d 15 (Ky. 2010)

NOTE: This case is a modification of an earlier decision.

FACTS: Hunt was accused and convicted of the murder of his wife. More facts are in the discussion, as needed.

ISSUE: Is it appropriate to seize evidence in anticipation of it being lost or destroyed?

HOLDING: Yes

DISCUSSION: Hunt raised numerous allegations of error. First, following the murder, he drove his vehicle into a nearby creek, where it was recovered. Before pulling the vehicle from the creek, one of the officers retrieved a shell casing from a precarious location on the window seal. The Court agreed that it was appropriate for the officer to do a cursory search and take possession of an item that would have inevitably have been discovered when the vehicle was searched, pursuant to a warrant the next day. The Court agreed it had been discovered pursuant to a valid plain view and the potential destruction of the evidence (during the tow) validated the need to move it.[42]

Hunt also argued as to the chain of custody of his clothing, which were tested and confirm to have traces of his wife's blood. The investigator had taken the items home to dry before packaging, and the Court agreed that there was "no realistic possibility that someone could have broken into Detective Thompson's wood shop and planted Bettina's blood" on the items. (The detective had taken the items there to dry them so they could be packaged as evidence.)

[40] See U.S. v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986) (agents created their own exigency by knocking on patio door after seeing marijuana in plain view through a window,. where-premises could have been covertly secured and warrant could have been obtained prior to approaching the patio); see also U.S. v. Richard, 994 F.2d 244 (5th Cir. 1993) (agents created exigent circumstances by announcing presence) .
[41] U.S. v. Leon, 468 U.S. 897 (1984); U.S. v. Morgan, 743 F.2d 1158 (6th Cir. 1984).
[42] Segura v. U.S., 468 U.S. 796 (1984)

Hunt also objected to an officer's characterization of a homemade item as a possible "silencer." It was objected to in an untimely manner, but the Court agreed that although the officer was not a firearms expert, it was a legitimate observation by an experienced officers. The error, if any, was not relevant.

The Court also addressed comments made by several people during the trial that Hunt refused to talk and concluded that the statements were not an impermissible comment on his right to silence.

After discussing a litany of other alleged errors, the Court affirmed Hunt's conviction.

SEARCH & SEIZURE - TERRY

Douthitt v. Com.
2010 WL 323210 (Ky. App. 2010)

FACTS: On January 21, 2008, Officer Maynard (Lexington PD) was observing traffic when he saw a Jaguar (driven by Douthitt) pull into the motel parking lot where Maynard was located. Douthitt and his passenger remained in the car for 3-5 minutes. Douthitt then got out with his pants lowered, but then raised and zipped his pants. Douthitt went into a motel room and returned a few minutes later. He stayed at the car for a few minutes, got out and approached the night office window. Again, he returned to his car, moved it to another space and stayed there for a few more minutes. At that point, Maynard drove to Douthitt's location to further investigate, as he knew the motel was known for drug and prostitution activity.

Officer Maynard asked for ID, Douthitt denied having any. He provided his Social Security number. He explained the pants issue, saying he had a missing button. He became nervous and shaky. He explained the other issues of concern to Maynard and denied consent to search the car. Maynard returned to his car to check Douthitt's records, and decided to call for a K-9 unit. Officer Karsner arrived in about three minutes and his dog quickly alerted. The officers searched and found a metal pipe with burn marks – Douthitt was immediately arrested for possession of drug paraphernalia. During the search of his person, Douthitt dropped a wrapper of crack cocaine. More crack cocaine and paraphernalia was found in the car.

Douthitt was indicted on various drug charges and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is it appropriate to check records during a Terry stop?

HOLDING: Yes

DISCUSSION: Douthitt argued that "because Maynard failed to observe anything that would confirm a suspicion of illegal activity warranting the initial encounter with Douthitt, any continued investigative detention amounted to an arrest unsupported by probable cause." Since Officer Maynard agreed that Douthitt was not free to leave, the Court agreed it was a seizure. In his appeal, Maynard conceded to the initial investigation was appropriate, but argued the "degree of the intrusion exceeded that which was reasonable and within the scope of the justification for the stop." The trial court had determined from the record that the detention was 14 minutes long – from Maynard pulling up in his car until the K-9 unit was called – and another 3 minute until it arrived. The Court noted that the dog arrived while Maynard was checking for outstanding warrants, which was an appropriate task during such a stop. The Court agreed

that the time frame was not excessive and that the use of the drug dog was appropriate, given the information already available to Officer Maynard.

Douthitt's plea was affirmed.

Moore v. Com.
2010 WL 199404 (Ky. App. 2010)

FACTS: On May 29, 2007, in Morehead, Officer Castle observed Moore and Eldridge "in a parking lot making a hand-to-hand exchange." He knew of Eldridge's prior involvement in drug trafficking, and although he could not see any contraband, he "could tell that the parties had exchanged something for money." After Eldridge left the scene, another person approached Moore's vehicle and left. Officer Castle stopped Moore and asked for consent to search. That was given, and Castle found hydroquinone pills and marijuana. Moore admitted to having sold drugs to Eldridge - Eldrige's girlfriend, who was in the car, confirmed that as well.

Moore was indicted on trafficking and moved for suppression. When that was denied, Moore took a conditional guilty plea and appealed.

ISSUE: May a combination of lawful actions be used to support a Terry stop?

HOLDING: Yes

DISCUSSION: Moore argued that Officer Castle lacked sufficient reasonable suspicion to make a Terry stop. The Court agreed that simply being in an area known for drug trafficking is not enough. However, in this case, "Officer Castle relied on several facts," including his knowledge of one of the subjects, his observation of a transactions and the "parties' uncomfortable reaction to a police vehicle driving by them."

The Court affirmed Moore's plea.

SEARCH & SEIZURE - EXIGENT ENTRY

Taylor (fka Noonan) v. Com.
2010 WL 204093 (Ky. App. 2010)

FACTS: In the early morning hours of July 21, 2007, Mayfield PD was contacted by a CI concerning crack cocaine trafficking at a specific address, 219 W. Walnut St. They arranged for the CI to make a controlled buy. The CI purchased crack from an unidentified person at the residence and delivered it to the police as required.

Corporal Farmer then sought a search warrant for 210 W. Walnut.[43] While waiting for it, the county attorney advised that "they could go into the residence and secure the premises while waiting for the warrant." Officers did so. Officer Keller later stated that they "secured the residence because there's a lot of people - some people outside and a lot of people inside." The officers required everyone to go outside while they waited for the warrant.

[43] Apparently a typographical error in the opinion.

Taylor was there at the time and was reportedly "extremely intoxicated." She asked for permission to use the bathroom and was denied. Eventually, though, after also stating she needed to get her purse, she was able to talk the officers into letting her use the bathroom. She then wanted to take her purse outside, but Officer Keller insisted he had to search it first, because they "were going to have a crowd of people outside" with "a very few, limited officers." He found a rock of crack cocaine in the purse and Taylor was arrested. A little while later, the warrant was issued and the residence was searched. No incriminating evidence was found.

Taylor was indicted and moved for suppression. When that was suppressed, she took a conditional guilty plea and appealed.

ISSUE: Is simply waiting for a warrant sufficient exigent circumstances to justify an entry?

HOLDING: No

DISCUSSION: Taylor first argued that the evidence should have been suppressed because "police unlawfully entered the subject property without a warrant and without the authority to enter implicitly conferred by the warrant requirement." The Court, however, recognized the entry as lawful as an exigent circumstances, the potential imminent destruction as evidence.[44] That burden is "a 'heavy' one that requires the demonstration of an 'urgent need."[45]

The Commonwealth argued that the "evidence of drugs 'might' have disappeared if anyone had discovered the police had the house under surveillance." However, the Court found this speculative since nothing suggested that "anyone had discovered - or was even on the verge of discovering - that police had the residence in question under surveillance or that the evidence was in imminent danger of being destroyed." The Court did not find this satisfied the "urgent need" to enter the residence at that time.

The Court agreed that "'the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence' before entering a home on the basis of exigent circumstances." Further, because the "evidence uncovered here as a direct result of that entry and subsequent search of Taylor must be suppressed as "fruit of the poisonous tree" because the "exclusionary rule" prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment."[46] The Court further agreed that other doctrines, such as independent source or inevitable discovery, did not apply, as there was no indication that the evidence would have been found otherwise - since there was nothing in the record that indicated whether Taylor was an occupant or a visitor to the house. If the latter, it was "unclear whether the search warrant would have authorized a search of Taylor's personal effects - particularly given that the warrant did not specifically name any individuals as suspects or subject them to a search."

The Court reversed the denial of the suppression motion and remanded the case.

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[44] Posey v. Com., 185 S.W.3d 170 (Ky. 2006).
[45] Welsh v. Wisconsin, 466 U.S. 740 (1984).
[46] Wong Sun v. U.S., 371 U.S. 471 (1963).

VEHICLE STOP - ROADBLOCK

Com. v. Singleton
2010 WL 45917 (Ky. App. 2010)

FACTS: On September 4, 2008, Liberty PD was conducting a checkpoint, to check for stickers on vehicles, as required by local ordinance. (Anyone living or working within Liberty was required to display the sticker.) Vehicles that displayed the sticker were allowed in unimpeded, vehicles without the sticker were stopped.

Singleton approached at about 7:45 a.m. and did not have a sticker. He was stopped and as he rolled down the window, Chief Garrett detected the strong odor of marijuana. The Chief also noted that Singleton appeared to be under the influence. He admitted, upon questioning, to having just smoked marijuana. Singleton failed field sobriety tests. The vehicle was searched and marijuana was found, and Singleton admitted he'd tossed out more marijuana upon approaching the checkpoint. He was arrested for DUI and trafficking in marijuana.

He was indicted, and moved for suppression. The trial court agreed that the traffic checkpoint was unconstitutional as it did not have anything to do with criminal activity. The Commonwealth appealed.

ISSUE: Is a checking for compliance with a city ordinance a legal roadblock?

HOLDING: Yes

DISCUSSION: It was undisputed that the primary purpose of the checkpoint was to monitor compliance with a city ordinance. The Court equated the situation with an almost identical case from another Kentucky jurisdiction, in which it found the process functionally equivalent to checking a vehicle's registration.[47] The court also found that the systematic plan was appropriate. The Court found the checkpoint to be constitutional.

Singleton's appeal was denied.

VEHICLE STOP - PROBABLE CAUSE

Graham v. Com.
2010 WL 567320 (Ky. App. 2010)

FACTS: In July,2007, Graham was stopped by Detectives Final and King (Louisville Metro PD) for a minor traffic offense. Gritton, a passenger, admitted to possessing crack cocaine, and the vehicle was searched. Six individually wrapped pieces of crack were found. Graham was indicted for Trafficking in a Controlled Substance and the charge was subsequently amended to reflect it was a second or subsequent offense. Graham took a conditional guilty plea, after a guilty verdict was rendered but before sentencing, and appealed.

[47] Salmon v. Com. , 2007 WL 3227039 (Ky. App. 2007)

ISSUE: Is a traffic stop unlawful because the jury acquits on the traffic offense?

HOLDING: No

DISCUSSION: Graham argued that the traffic stop was improper because the officers lacked probable cause to stop him. In fact, the jury did not convict him of the traffic offenses, only the drug offenses. The Court, however, found that the jury's decision was "inconsequential" to it's ruling, and upheld Graham's conviction.

INTERROGATION - QUARLES

Carver v. Com.
303 S.W.3d 110 (Ky. 2010)

NOTE: This is a modification from an earlier ruling.

FACTS: Carver was arrested following a burglary in Scottsville - he had been captured and beaten by the homeowner prior to the arrival of police. He was handcuffed and secured in the cruiser, but because he was out of control and combative, he was not immediately frisked. While officers were questioning the witnesses, Carver kicked out the cruiser window. He was taken to the hospital to be checked. The handcuffs were removed for x-rays, and he promptly "knocked over a table and raised a knife, which he flourished." Sgt. Cooke asked him "what he was doing with the knife" and Carver responded to the effect that he should have been better checked before being put in the car. The steak knife was later identified as having come from the burglarized home, although Carver stated he grabbed if at the hospital

Carver was convicted of Burglary and related charges and appealed.

ISSUE: Is there a public safety exception to the Miranda requirement?

HOLDING: Yes

DISCUSSION: Carver argued that his statements at the hospital were inadmissible because he had not yet been given Miranda warnings. The Court, however, stated that Carver's "possession of the steak knife at the hospital created a safety risk to hospital staff, patients, police officers, and himself. An exception to the Miranda warning requirement exists when public safety is at risk."[48] Once he flashed the knife, the officer "had a duty to quickly disarm him and ascertain how he obtained it, lest he acquire another." The question was "was not intended to prompt a confession or provide incriminating evidence but was simply the officer's attempt immediately to diffuse a dangerous situation." Further, "while it may have been preferable for the police officers to provide the Miranda warnings prior to taking [Carver] to the hospital, his belligerent and combative nature made such warnings difficult, if not impossible, to provide."

In addition, although he was "technically in police custody in the hospital x-ray room; but he was not in an inherently oppressive interrogation atmosphere." In fact, he was temporarily *in* control of the situation. His nonresponsive answer to the officer's question shows that he "was not succumbing to the inherent pressure of police custody" but instead was "in open defiance of it." The Court agreed that "requiring police officers

[48] U.S. v. Quarles, 467 U.S. 649 (1984).

to issue a Miranda warning to the suspect holding them at knifepoint or gunpoint does nothing to further the Miranda decision's goal of protecting and preserving Fifth Amendment Rights." There was adequate additional proof that he obtained the knife at the house, rather than at the hospital, as well.

Carver's conviction was affirmed but he was ordered to be resentenced due to a procedural error in his prior conviction status.

TRIAL PROCEDURE/ EVIDENCE - DOUBLE JEOPARDY

Little v. Com.
2010 WL 1005865 (Ky. 2010)

FACTS: Little was arrested in Virginia on an unrelated matter. Because the vehicle in which he was placed lacked a cage, he was put into the front seat, handcuffed. However, he was able to steal the vehicle, leading officers in a chase that entered into Kentucky. Trooper Surber (KSP) put out a stop strip but Little avoided it, almost hitting the trooper in the process. Officer Swindell (Jenkins PD) deployed another stop strip and again, Little swerved, almost hitting Swindell. However, Little's vehicle fishtailed and he was "stopped by a large rock."

Little was charged with Wanton Endangerment and Fleeing and Evading, along with related charges. He was convicted and appealed.

ISSUE: Is it double jeopardy to charge with both Wanton Endangerment and Fleeing and Evading?

HOLDING: No

DISCUSSION: Among other issues, Little argued that it was double jeopardy to charge with both Wanton Endangerment and Fleeing or Evading, as "operating a motor vehicle with the intent to elude or flee the police will always manifest extreme indifference for the value of human life."

The Court looked to the Blockburger rule, with requires that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[49] The Court ruled that an "overlap of proof does not necessarily establish a double jeopardy violation." As such, both charges were invalid and his convictions affirmed.

Com. v. McCombs
304 S.W.3d 676 (Ky. 2010)

FACTS: During a pending divorce, and following the issuance of an emergency protective order, McCombs broke into his wife's home. He got into a physical altercation with his stepson. He was ultimately convicted of Burglary, Assault and Violation of a Protective Order. McCombs then appealed.

ISSUE: Do charges of both Burglary and Assault constitute double jeopardy?

[49] Blockburger v. U.S., 284 U.S . 299 (1932).

HOLDING: No

DISCUSSION: McCombs argued that first, the convictions for burglary and assault constituted double jeopardy. Applying the test under Blockburger v. U.S., the Court compared burglary and assault.[50] The Court noted that he could have been convicted for first-degree burglary for his possession of a dangerous instrument (a crowbar) and convicted of fourth-degree assault without an unlawful entry. However, in Butts v. Com., the Court had held that the physical injury for an assault conviction could not also serve to satisfy the physical injury of a non-participant for the first-degree burglary charge. The Court decided, however, that its decision in Butts was decided incorrectly, and that the "physical injury element of fourth-degree assault and the physical injury element of first-degree burglary are not one and the same." Further, the Court agreed that no particular mental state was required to the physical injury aggravator for burglary.

Finally, the Court addressed the issue of whether it was incorrect for the trial court to call the crowbar a deadly weapon. At the time of the initial trial, the law was undecided, and noted that now, it was a decision to be made by the jury.[51] The Court, however, agreed that the jury would have found that the crowbar was a deadly weapon (a club) or at the least, it was a dangerous instrument since "such an instrument, when swung by an adult male, is readily capable of causing serious physical injury and even death."

McCombs's convictions were affirmed.

Stewart v. Com
306 S.W.3d 502 (Ky. 2010)

FACTS: On October 6, 2006, Sgt. Combs (Lexington PD) pulled over Stewart for "improper traffic signals and failure to illuminate the license plate." Stewart presented a suspended OL under the name of Jones. He was then arrested for the suspended OL and the truck searched incident to the arrest. Cocaine, marijuana and scales were found. Stewart was identified at the jail and his license was found to be valid - he was then immediately re-arrested on the drug charge. He was also charged for cocaine found on his person at the jail.

Stewart was convicted on multiple drug charges and appealed.

ISSUE: Is Possession of a Controlled Substance and Promoting Contraband double jeopardy?

HOLDING: No

DISCUSSION: Stewart argued that convictions for both possession of a controlled substance and promoting contraband was double jeopardy. The Court compared to two charges under the Blockburger test, in which "the focus is on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence which would be presented at trial." In the two charges in question, the Commonwealth argued that the first charge was for the distinct quantity of cocaine found in the vehicle, and the second was for the cocaine found at the jail. His arrest interrupted the continuing charge of possession of cocaine, and thus it was not double jeopardy.[52]

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[50] Supra.
[51] Thacker v. Com., 194 S.W .3d 287, 290-91 (Ky. 2006).
[52] Fulcher v. Com., 149 S.W.3d 363 (Ky. 2004); Henry v. Com., 275 S.W.3d 194 (Ky. 2008).

The Court affirmed his conviction on those two charges, although another charge was dismissed for an unrelated reason.

TRIAL PROCEDURE/ EVIDENCE - EXPERT WITNESS

Goosey v. Com.
2010 WL 985382 (Ky. App. 2010)

FACTS: Goosey was charged and convicted, partially as a result of the testimony of an experienced tire salesman concerning the type of tire found at the scene of a crime. The salesman, Ross, had no particular DV or degree nor did he depend upon any particular science to identify the tire, just his long experience. He was, however, admitted as an expert. Goosey appealed.

ISSUE: May an experienced tire salesman be considered an expert in tire tread?

HOLDING: Yes

DISCUSSION: Goosey argued that it was inappropriate to admit Ross as an expert witness. Apparently the trial court did examine his qualifications under Daubert v. Merrell Dow Pharmaceuticals, Inc.[53] and considered his opinion admissible. The Court agreed that the Daubert factors were sufficiently flexible, "otherwise [it risked] alienating those with life and practical experience." In light of his years of experience, and the opportunity for the defense to explore any weaknesses in his abilities, the Court agreed it was appropriate to qualify Ross as an expert.

Goosey's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE - IMPEACHMENT

Boyd v. Com.
2010 WL 743596 (Ky. App. 2010)

FACTS: Boyd was charged with shooting and killing an unarmed subject. He admitted the shooting, but argued that he "panicked and fired when he thought he saw the victim reaching for his own weapon." He was convicted of wanton murder, and appealed.

ISSUE: May derivative statements be used during an impeachment?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, Boyd argued that taped statements made by several witnesses should have been suppressed. The witnesses testified at trial, differently than they had testified in statements, and the tapes were used to impeach their trial testimony. He argued that the statements were "derived from a statement" made by another man, which had been suppressed. The trial court had applied

[53] 509 U.S. 579 (1993).

U.S. v. Nobles, which held that the "Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial."[54] The appellate court, however, noted that missed the point, and that Boyd was arguing that they were "inadmissible as 'fruits of the poisonous tree,' with the poisonous tree being Hill's inadmissible statement."

The Court noted that the "concept of derivative evidence" required that Boyd first establish a "factual nexus between the illegality and the challenged evidence." Only then did the prosecution have to refute that claim. The Court ruled that in this case, the connection between the statements was "highly attenuated" and that the statements were admissible.

The case was remanded for a further hearing, however, on an unrelated issue.

Snorton v. Com.
2010 WL 1005916 (Ky. 2010)

FACTS: Snorton was accused of the murder of McKinney, following a day of ingesting drugs with McKinney and others at Brown's home in Princeton. The murder took place after McKinney attempted to sell a gun to Snorton, and when Snorton refused, McKinney suggested to a companion that they simply rob Snorton. They did so and fled Snorton's home with money and crack cocaine. Snorton allegedly followed them to the apartment and fatally shot McKinney numerous times. (Various witnesses scattered during the shooting.) No guns were found. Snorton was also shot during the altercation and appeared later at the hospital with an arm wound, which he claimed occurred was when two unidentified men jumped him.

Snorton was interviewed several days later and eventually confessed to shooting McKinney, which he claimed was in self defense. He claimed to have gone to the apartment to recover his properly.

Snorton was convicted and appealed.

ISSUE: May a prior inconsistent statement be used to impeach a witness?

HOLDING: Yes

DISCUSSION: Among other issues, Snorton argued that he was not given the opportunity to impeach the testimony of other witnesses (who were in the apartment at the time of the shooting) "with their prior inconsistent statements given during videotaped interviews with Detective Sholar." Since the witnesses did not deny that they made the statements, but only that they could not recall whether they had made the statements, the trial court denied Snorton the opportunity to introduce the videotapes.

The Court followed:

> In Kentucky, it is well-settled that a prior inconsistent statement may be used to assail the credibility of a witness and may also be received as substantive evidence.[55] In order to

[54] 422 U.S. 225 (1975).

[55] Jett v. Com., 436 S.W.2d 788 (Ky. 1969) ; KRE 801A(a)(1) ; see also Askew v. Com. , 768 S.W.2d 51 (Ky. 1989) ("This Court's decision in Jett [] expanded the permissible use of prior inconsistent testimony from mere impeachment to use as

> sustain their admission, the statements must be "material and relevant to the issues of the case" and a proper foundation must be established so that "the witness whose testimony is to be contradicted, supplemented, or otherwise affected by the out-of-court statement may have a proper and timely opportunity to give his version or explanation of it."[56].

To determine if a statement is inconsistent, the Court must determine if "[a] statement is inconsistent . . . whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."[57] Underlying our policy in this respect is the belief that "[n]o person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, `I don't remember.' [58]

The Court concluded that the statements were "highly material and relevant" to Snorton's defense. However, since Det. Sholar was permitted to testify about the videotaped statements, the Court still agreed that the error was not harmless because he was denied the opportunity to present "crucial evidence going to his self-defense claim at a highly important time in trial."

The Court reversed the conviction.

TRIAL PROCEDURE/ EVIDENCE - SWEATING

McNeil v. Com.
2010 WL 1005911 (Ky. 2010)

FACTS: On January 12, 2007, Louisville Metro PD was called to a local apartment complex. There, they found Martinez on the hall steps, bleeding from a head wound. He reported to the officers that they would find two dead bodies in a nearby apartment; they did - Perez and Gallegos. Martinez explained that three other men had been present in the apartment and attacked them. The apartment was actually registered to an individual, Solis, who could not be found - he was later discovered to have fled to Mexico following the attack and was in custody there. His wife was located at her mother's home in Indiana - she admitted her husband sold narcotics for a living.

McNeil was identified as a suspect in the shooting because he lived next door to Solis's brother, Jesus, and was black, as described by the victims. He was brought in on an unrelated outstanding warrant and questioned for about eight hours. He admitted having been at the apartment but denied shooting the men. He pointed to others who had been at the apartment (the Solises) as the ones that had shot and beaten the men. All three were indicted and eventually McNeil was convicted of murder and assault, robbery and

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substantive evidence. It was our position that the trier of fact was entitled to be informed of prior inconsistent statements made by the witness and permitted to weigh both versions to determine where the truth lay.") .

[56] Jett, supra. see also KRE 613 ("Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them.")

[57] Brock v. Com. , 947 S.W .2d 24 (Ky. 1997) (emphasis added) (citing Wise v. Com.., 600 S.W.2d 470 (Ky. App. 1978)); see also Young v. Com. , 50 S.W .3d 148 (Ky. 2001) ("We have held that when a witness at trial professes not to remember making a prior assertion, he/she can be impeached by introducing a prior statement of the witness wherein the assertion was made .") (emphasis in original) .

[58] Wise, supra; see also Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001) ("[T]he `forgetful' witness is not new to Kentucky courts .") .

related charges. One of the Solis brothers took a guilty plea (the other was apparently tried in absentia, since he was in Mexico) prior to trial. McNeil appealed.

ISSUE: Is a lengthy interrogation illegal "sweating" under Kentucky law?

HOLDING: No

DISCUSSION: McNeil first argued that he was illegally arrested for the murder, but the Court noted that he "conveniently ignored the fact" that he was actually arrested on an unrelated bench warrant. Once he was under arrest, "nothing prohibited the police from questioning him about another investigation." [59] He was properly giving Miranda, and was told he "was being investigated for the murders at issue in this case."

McNeil argued his statement was as a result of illegal "sweating" and coercion - KRS 422.110.[60] The Court, however, noted that "other than its length, the interrogation was quite tame." He knew why he was being questioned, and apparently "talked freely." He "never asked to end the interview and never requested an attorney."

McNeil's convictions were affirmed.

TRIAL PROCEDURE/ EVIDENCE - PROOF

Modrzejewski v. Com.
2010 WL 890015 (Ky. App. 2010)

FACTS: Modrzejewski was charged with drug trafficking in Laurel County, as a result of an undercover buy. During the arrest, pill bottles containing oxycodone, soma and alprazolam (Xanax) were seized which were in containers prescribed to both Modrzejewski and McCardle, who was also in the vehicle. He was convicted and appealed.

ISSUE: Is the location and quantity of pills proof in a Trafficking case?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that although the recovered pills were prescribed to the two men, they were "of the variety and quantity necessary to complete the arranged transactions and could therefore constitute evidence of intent to sell." (The amount of pills in McCardle's possession alone was not enough to complete the sale.) The location of the bills, in the vehicle, with the containers in the same shaving kit, was sufficient as well, as it was incongruous for the jury to find that the medications were only for personal use.

Modrzejewski's conviction was affirmed.

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[59] McNeil v. Wisconsin, 501 U .S . 171 (1991) .

[60] No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so .

Bratcher v. Com.
2010 WL 252245 (Ky. 2010)

FACTS: In June, 2006, Ball returned home to Bowling Green to find his home burglarized and vandalized. A number of items were stolen including a Mercedes-Benz which was found in a nearby parking lot "with significant damage." As a result of a Crime Stoppers program, the police received an anonymous tip that the perpetrators lived in a specified apartment. That apartment was occupied by the Bratchers (Michael and Rachel) and Thurman. The officers started surveillance. Sgt. Skaggs (KSP) got a search warrant for the apartment and property from Ball's home was found. Michael Bratcher was indicted on burglary and theft, and sometimes later, criminal mischief was added as well. Bratcher was eventually convicted and appealed.

ISSUE: Must the prosecution prove specific damages when a subject is accused of a criminal damage offense?

HOLDING: Yes

DISCUSSION: Among other issues, Bratcher argued that the Commonwealth never proved specific amounts of damages relevant to the two charges of criminal mischief - damage to the house and damage to the car - attributable to Bratcher. (They did prove overall amounts, however.) Bratcher was only specifically alleged to have broken the glass in the back door of the house. He was also seen driving the Mercedes-Benz and hitting mailboxes and signs, but again, no specific amount was attributed to Bratcher's actions. The Court noted that Bratcher was not charged as an accomplice, but as the primary actor, and as such, the damage must be proved to him. The Court reversed his convictions for criminal mischief.

The Court also noted that although it would not have been improper to have tendered a "receiving stolen property" instruction, along with the theft instruction, that RSP was not a lesser-included offense of theft since they carry the same penalty.

Finally, Bratcher argued that it was improper for the detective to read into the record a list of the items stolen from the Balls. Of note, the detective mentioned a "fur coat that was very dear to [Ms. Ball]." The trial court permitted it, although the judge agreed the characterization was inappropriate, since the victims were also going to testify later. The Court ruled that the objection to the admission of the hearsay should have been sustained, but that the error was harmless in that it was unlikely to have swayed the jury in any substantial way. Ms. Ball's testimony cured any error that was committed earlier. In addition, the Court agreed it was appropriate to charge with two counts of theft and burglary since the crimes actually occurred over two days, with two separate entries, separated by some hours.

Bratcher's conviction was partially reversed and the case remanded.

TRIAL PROCEDURE/ EVIDENCE - TESTIMONY

Jackson v. Com.
2010 WL 252244 (Ky. 2010)

FACTS: Jackson was charged with the fatal shooting of Washington, in May of 2006, in the Iroquois Homes housing project in Louisville. Jackson agreed he had shot Washington but argued that he did so unintentionally during a struggle. Jackson was convicted of murder and tampering with physical evidence, and appealed.

ISSUE: May an officer give a lay opinion?

HOLDING: Yes

DISCUSSION: Among other issues, a testifying officer was asked about photos that showed Washington's body. The prosecutor asked the officer if "in his opinion and experience, the body appeared to have been in a struggle." Upon objection, the officer expanded, stating that when he "first observed the body at the scene," the clothing was intact and that he saw no evidence consistent with a struggle. A detective testified as to his visual examination of the body, and that he'd found small drops of blood and the shirt was slightly soiled. He also stated that "his jacket was still on his shoulders and that his hat was still on his head." The Court agreed "that both witnesses' opinions were clearly admissible as lay opinion and thus find no abuse of discretion in this regard."

Jackson's conviction was affirmed.

Patterson v. Com.
2010 WL 1005976 (Ky. 2010)

FACTS: Patterson was involved with a woman who had three children, one of whom was a 13 year old female. The two other children were several years younger. Patterson was ultimately charged with the rape of the 13-year-old girl, which allegedly occurred in February, 2005, although she did not speak to an officer about it until March, 2006, after a "considerable amount of counseling" and removal to foster care. He was convicted and appealed.

ISSUE: May a witness "bolster" another witness's testimony?

HOLDING: No

DISCUSSION: During testimony, an officer who interviewed the girl was allowed to "testify that in his experience child sex-abuse victims were almost always initially reluctant to 'give up information,' and that commonly they provided additional details as time went on." Patterson argued that this constituted improperly bolstering of the victim and the Court agreed.

The Court continued:

> In Sanderson v. Com., we recently reiterated the rule against this sort of class habit testimony and explained that a party cannot introduce evidence of the habit of a class of

> individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he/ she acted the same way under similar circumstances .[61]. This rule applies to investigators,[62] as well as to exports, Sanderson, and it applies whether the testimony is offered on direct examination of a witness during the Commonwealth's case in chief or, as it was here, on redirect examination for the purpose of rebuttal or rehabilitation.[63]

Because the Court agreed that the case turned on the jury's assessment of the victim's credibility, the error was not harmless. For this, and other reasons, Patterson's conviction was reversed.

TRIAL PROCEDURE/ EVIDENCE - HEARSAY

Janes v. Com.
2010 WL 252249 (Ky. 2010)

FACTS: Janes and Lawless shared a home in Jefferson County, along with Lawless's two sons. After a number of arguments, Lawless threatened to leave Janes. When Lawless arrived home, she found Janes drunk and he attempted to shoot her. Lawless fled to the neighbor's home and called police. The officers found both of Lawless's sons had been shot, and Janes also had been shot. All three survived.

Janes was charged with Assault and Wanton Endangerment (for shooting at Lawless). At trial, the investigating officer "testified that he had interviewed Janes while Janes was hospitalized." He gave Miranda warnings. When he started to "relate Janes's response," defense counsel objected, but the trial court permitted the officer to answer - to the effect that Janes told him that "something bad happened that should not have happened, but..[Janes) would only talk about it with his attorney present." At that point, he stopped the questioning.

The trial court did admonish the jury that "it could not hold against Janes his invocation of his rights to remain silent and to have counsel."

Janes was convicted and appealed.

ISSUE: Is the introduction of a party's own statement hearsay?

HOLDING: No

DISCUSSION: Janes raised the issue of the officer's testimony about his statement.

The Court noted that:

> Obviously, Janes had the rights to silence and to the services of counsel. But we agree with, the Commonwealth that Janes did not invoke those rights until after he had already made a statement. In other words, once informed of his rights, Janes did not immediately

[61] 291 S.W.3d 610 (Ky. 2009), (citing Kurtz v. Com., 172 S.W .3d 409 (Ky. 2005).
[62] Miller v. Com., 77 S .W.3d 566 (Ky. 2002).
[63] Newkirk v. Com., 937 S .W.2d 690 (Ky. 1996).

> invoke his rights to silence and to counsel . Instead, he blurted out that something bad had happened but that he would not talk about it. Only after making those comments did Janes arguably invoke his rights to silence and counsel by saying he would not speak further without an attorney.

Since the prohibition against hearsay does not prohibit the admissibility of statements of a party, such as Janes, there was no prohibition on the Commonwealth's placing into evidence, by way of the officer to whom Janes made the statement, Janes's statement that something bad had happened that should not have happened. As the United States Supreme Court has recognized, "a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."

The Court agreed that although the officer's statement about the invocation of the right to silence may be have been impermissible, that the admonition was sufficient to cure the error.

Janes's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE - RULE OF COMPLETENESS

Odom v. Com.
2010 WL 1005958 (Ky. 2010)

FACTS: During the overnight hours of July 20-21, 2004, various people were using and selling drugs at a Louisville crack house. That night Sickles, Cooper, Mott, Williams and Odom were at the house. Smith came and went during the day, buying drugs from Odom. At some point, Odom dozed off - he woke to discover that he was missing drugs or money.[64] He became angry and told Sickles and Smith to go outside with him - he accused Smith of stealing his drugs. Ritchie passed by on his bicycle and tried to calm Odom, but he then witnessed Odom shoot Smith. As Ritchie fled the scene he heard gunshots. Sickles also testified that Odom shot and killed Smith. Cooper heard the shots and went to the window, and heard Odom ask Sickles to help him move the body. Mott and Cooper (both female) fled to another house - Odom followed them there and pistol-whipped Mott. (Mott did not appear at trial as she could not be located, but photos were shown of her injuries.)

Sickles's mother, McWhorter, testified that the same morning, Odom came to her house in a "fit of rage" and broke windows in her house and car.

Odom was indicted on Murder, Assault and Criminal Mischief, but he could not be found in Louisville. He was arrested 6 weeks later in Indiana on unrelated Robbery charges. Odom was transferred to Kentucky to stand trial after his conviction in Indiana. During the course of the trial, he was in a holding cell with Mott and Cooper (both in custody for something else) and he told them to keep quiet. Cooper and Mott both reported this and Odom was charged with intimidating a participant in a legal process. (He was also charged with attempted escape, but there was little in the record on that charge.)

[64] The facts apparently, were not clear on which was taken.

After a mistrial and much dissatisfaction with his attorney, and several changes in trial counsel, Odom eventually effectively represented himself, with assistance by stand-by counsel. Mott could not be found at the second trial. He stood trial in late 2007 and was convicted. He then appealed.

ISSUE: If a partial statement is admitted, it is appropriate to ask that the entire statement be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: Because Mott could not be found, she could not testify. However, Odom, representing himself, raised the issue and questioned witnesses about Mott's statement. The Commonwealth objected and the Court explained to Odom that "he had the advantage" because her statement was not before the jury. He declined the Court's offer to enter her statements before the jury, but later, he asked questions again of Det. Hableib on the issue. The Prosecutor requested that the entire statement be admitted - not only on the assault charge but also with respect to the intimidation charge. The Court agreed that Mott's two statements were "clearly testimonial" and that Crawford v. Washington[65] applied. The Commonwealth argued that the statement was admissible under the "rule of completeness" - KRE 106. The Court agreed that "while [Odom] improperly asked Hableib about the assault statement, he in no way opened the door to the admission of Mott's intimidation statement." Because it dealt with intimidation of both Cooper and Mott, the court found the error was not harmless and reversed the convictions for intimidation.

Further, even thought Mott could not be found, Cooper did testify, and the Court found that to be sufficient.

During the trial, the prosecutor commented on Odom's "flight" to Indiana as proof of guilt. Det. Hableib testified that Louisville police were actively seeing Odom in the area and could not find him. The Court agreed that "[i]t has long been held that proof of flight to elude capture or to prevent discovery is admissible because 'flight is always some evidence of a sense of guilt."[66] That rule "survived the adoption of the Kentucky Rules of Evidence." However, that flight has been "spatially and temporally close to the crime charged." Odom argued that it was prejudicial to introduce evidence of his being featured on Louisville's Most Wanted and being featured on a BOLO flyer - agreeing that it was introduced to establish that he was being extensively sought.

After addressing other issues, the Court upheld Odom's conviction on all but the intimidation charges.

Hannah v. Com.
306 S.W.3d 509 (Ky. 2010)

FACTS: Hannah shot Grady, during an altercation in Paducah, on October 28, 2004. There was testimony that Grady was knocked to the ground and then shot as he was getting up. Hannah, who testified, stated he was afraid Grady and/or his friends were going to kill him. Hannah was convicted of murder and appealed.

ISSUE: May a party ask that an entire statement be introduced?

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[65] 547 U.S. 813 (2006).
[66] Rodriguez v. Com., 107 S.W.3d 215 (Ky. 2003) (quoting Hord v. Com., 13 S.W.2d 244 (1928)) .

HOLDING: Yes

DISCUSSION: Among other issues, Hannah argued that he "gave five differing versions of what happened the night Grady was shot." His statements were apparently recorded, but were not played - instead, the officer witness summarized the differing versions. In some cases, the witness characterized the statements rather than repeating them verbatim.[67] The Court looked to KRE 106 and noted the rule allows a party to request the admission of an entire statement when only part of it is introduced. However, that was for the trial court to decide and would only be reversed on a showing of an abuse of discretion.

The Court, however, vacated his judgment on unrelated procedural matters.

TRIAL PROCEDURE/ EVIDENCE - TRANSCRIPT

Pelegrin-Vidal v. Com.
2010 WL 1006277 (Ky. 2010)

FACTS: Pelegrin-Vidal was convicted of the murder of his girlfriend, Elaine Fonseca, in 2002, in Louisville. He appealed.

ISSUE: Is it permissible to enter a transcript of an audiotape into evidence which include interpretations of inaudible portions?

HOLDING: No

DISCUSSION: Among other issues, Pelegrin-Vidal argued that it was error to admit the audiotape and transcription of the 911 call of the break--in that immediately preceded the murder. The Court reviewed the recording, which although poor, was relatively understandable. As such, it was properly admitted. However, the Court found it to be error for the unauthenticated transcript, which included interpretations of "certain inaudible portions" of the recording, to be admitted. If the recording was so inaudible in part as to require a transcript, admitting the transcript would result in the transcript becoming the evidence. The Court found that the error in admitting it was not harmless, and as such, was sufficient to warrant reversal.

In addition, he argued that although he waived his Miranda rights, which were given in Spanish by Florida officers who made the initial arrest, he did not "fully understand the implications of his waiver, due to his Cuban heritage." The Court noted that a transcript of his interrogation "evidences no lack of understanding as to the nature of his Miranda rights." He also argued that the Florida officers did not honor his request for an attorney, but the Court found that his statement, such as it was, was not a "clear assertion of his right to counsel."

However, because of the issue with the recording, his conviction was reversed.

[67] As an example, the officer said Grady pistol-whipped the victim, when in fact, he simply said he hit the victim.

TRIAL PROCEDURE/EVIDENCE - CRAWFORD

Laymon v. Com.
2010 WL 668656 (Ky. App. 2010)

FACTS: On the morning of July 8, 2006, McCracken County deputies found J.A. sleeping in her mother's car. She stated that Laymon had "entered her bed and touched her inappropriately." She was not taken for any testing. She was present but did not testify at trial, instead, three other persons testified about what she had said. Laymon was convicted of sexual abuse and appealed. The case was appealed to the circuit court and affirmed. Laymon further appealed.

ISSUE: May statements given by a victim some hours after the crime be introduced by another witness?

HOLDING: No

DISCUSSION: The Court noted that the lower courts had failed to give enough consideration of Davis v. Washington, Heard v. Com., and Rankins v. Com.[68] Under that line of cases, the statements made by J.A. to her family and the deputies, several hours after the abuse, were testimonial. "There was no ongoing emergency," but instead, "she was questioned in an effort to facilitate criminal prosecution."

Laymon's conviction was vacated.

Stanley v. Com.
2010 WL 323123 (Ky. App. 2010)

FACTS: Stanley was accused of an armed robbery that occurred on February 23, 2007, in Henderson County. Detective Herndon later testified that he brought her into the station, gave Stanley her Miranda rights and questioned her. She confessed and handed over a knife. Det. Herndon testified at length about her confession. Stanley testified that although she had been present, that she had given the knife to another subject, Turner, who committed the actual robbery. She was unaware that he was going to commit the robbery when she handed him the knife to cut the cocaine.

Stanley was convicted of complicity to commit robbery and she appealed.

ISSUE: May witnesses testify as to what another witness said as to what occurred?

HOLDING: No

DISCUSSION: The Court quickly concluded that the evidence provided by Det. Herndon, the only prosecution witness, was testimonial and was admitted in violation of Crawford v. Washington.[69] The Court noted that "the jury was given the statements of the victim as to 'what happened' with the primary purpose to establish criminal liability without Stanley having the opportunity to cross-examine the witness accusing her." Stanley's conviction was reversed.

[68] 547 U.S. 813 (2006); 217 S.W.3d 240 (Ky. 2007); 237 S.W.3d 128 (Ky. 2007)
[69] 541 U.S. 36 (2004)

TRIAL PROCEDURE/EVIDENCE - VIDEO

Vilardo v. Com.
2010 WL 890010 (Ky. App. 2010)

FACTS: Vilardo was incarcerated at the Kenton County Detention Center on Dec. 4, 2007. A jailer noticed the smell of marijuana when he walked back the cell. Vilardo refused urine testing and was taken to an isolation cell. Later that day, Vilardo got into a scuffle when he refused to change into a jail jumpsuit. He injured his mouth and spat blood at two deputy jailers. He was restrained, but attempted to bite another deputy jailer as well.

Vilardo was indicted on First-Degree Assault. He filed a motion to prevent a videotape, which caught part of the scuffle, from being shown. He also moved that certain statements he made be excluded (racial slurs toward one of the jailers). The Court denied his motions and ultimately, Vilardo was convicted of two charges of Third Degree Assault and related offenses. He then appealed.

ISSUE: Is a videotape admissible that shows demeanor and intent of a suspect?

HOLDING: Yes

DISCUSSION: Vilardo argued that the videotape contained material that was irrelevant and prejudicial. The "challenged portion of the videotape features Vilardo agitated, cursing, and yelling" - he argued that the only part that was relevant was his lunge toward one of the jailers. The prosecution argued that it is a "direct depiction of the events, it portrays the demeanor and intent of Vilardo, and substantiated the testimony of eyewitnesses." Previously rulings supported the Commonwealth's position.

In addition, the trial court properly delayed ruling on the testimony concerning the slurs. When it was introduced, the defense counsel failed to object, not preserving it for review. The Court also noted that a complaint about testimony elicited from one of the deputy jailers was also not objected to a trial, thereby removing it from consideration by the appellate court.

Vilardo's conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE - PRIOR BAD ACTS

Willis v. Com.
304 S.W.3d 707 (Ky. App. 2010)

FACTS: In April, 2007, Ruby Willis initiated divorce proceedings against her husband Larry. On June 19, following Larry's request for a meeting, law enforcement officers arrived at the meeting site, a BP station, and found that he had a gun, rope, a knife and binoculars. Ruby then sought an EPO. In an incident several months later, Larry allegedly tried to drown her in a swimming pool. A week later, Ruby arrived with friends to move her belongings. Larry and Ruby stepped outside and Larry shot Ruby. Ruby suffered life threatening injuries and suffered brain damage from lack of oxygen.

Larry was charged with First Degree Assault and Attempt-Murder. The Assault charge was reduced to second degree and he was convicted. Larry Willis appealed.

ISSUE: Is evidence of prior bad acts ever admissible?

HOLDING: Yes (but not always)

DISCUSSION: Willis argued that the admission of the other acts of violence were in violation of KRE 404(b), which prohibited the "admission of evidence of bad acts other than those charged unless they serve to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Court agreed that the evidence was, however, admissible.

Willis's conviction was affirmed.

Ray v. Com.
2010 WL 890007 (Ky. App. 2010)

FACTS: Ray and Fields (and their son) lived together in Louisville for two months, in 2005, until Fields received a DVO against Ray. In 2007, Ray was accused of Rape, Sodomy, Burglary and related charges, with Fields as the victim, but he was only convicted of violating a protective order. Ray appealed.

ISSUE: May evidence of an act of violence that resulted in a protective order be introduced in a case involving a violation of the protective order?

HOLDING: Yes

DISCUSSION: Ray argued that it was impermissible to allow evidence of his past bad acts in as evidence, which included evidence of prior instances of his harassment of Fields. He complained this was a violation of KRE 404(b), which normally precludes such evidence, unless it fits of the specific categories listed in the rule.

The Court looked to Bell v. Com., which

> … articulated a three-part test for determining whether the admission of such evidence was proper: "Is the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused? . . . Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence? . . . Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?[70]

The Court noted that it was "logically impossible to prove violation of a protective order without first establishing that a protective order existed with respect to the alleged victim." The court agreed that Assault claims with respect to the DVO could properly be admitted and was not outweighed by the possible prejudice against the defendant.

[70] 875 S.W.2d 882 (Ky. 1994).

With respect to the alleged harassment, the court agreed the trial court should have done a separate analysis of the evidence before ruling it admissible, but held that error to be harmless. After discussing other, unrelated procedural issues related to the trial, the Court upheld Ray's conviction.

EMPLOYMENT - NEGLIGENCE

Johnson v. UPS
2010 WL 567375 (Ky. App. 2010)

ISSUE: Johnson and Rivers were employed by the Kroger Distribution Center in Jefferson County. On May 27, 2006, they went to lunch at a nearby restaurant. An argument broke out between the two. Rivers retrieved a gun from his car and then shot Johnson to death.

Rivers had worked at UPS before his employment at Kroger, and while there, had "displayed aggressive behavior on numerous occasions" including making specific threats which were reported to UPS security. He was disciplined, required to attend anger management classes, and later terminated. When he applied to Kroger, UPS provided only the dates of his employment and the title of his position.

Johnson's estate filed suit against UPS, arguing it was negligent in failing to warn Kroger about Rivers' behavior. UPS moved for dismissal, arguing that it had no duty to warn. The Estate appealed.

ISSUE: Is there a general duty to protect in Kentucky?

HOLDING: No

DISCUSSION: The Court reviewed the elements of a negligence cause of action – duty, breach, causation damages. It agreed that "no additional analysis is required if it is found that no legal duty exists" and that "duty must first be established in a negligence action."[71] The Court further noted that it was "well-settled … that there exists no duty to act in the protection of others or to alert others that a crime may be committed by another." The Estate pointed out that it had become the trend for employers to "refuse to give references for fear of defamation suits by former employees." The Estate argued that there was a "special relationship" that "established a duty to warn foreseeable third parties."

The Court however, while sympathetic, was reluctant to create a duty where one did not yet exists, and suggested it was "more appropriately the role of the Kentucky Supreme Court or [the] Legislature to change existing law if either body deems such a change proper."

The Court further noted that "Kentucky does not recognize a boundless and general 'universal duty of care.'" In addition, although some other jurisdictions have recognized a duty to warn about a crime that may be committed by someone else, Kentucky had not yet "adopted such a rule." The Court was not persuaded that there is a "special relationship between employer and ex-employee or future employers which would create a duty to warn." Although the Court had recognized the employer-employee relationship as a special relationship, it did not extend beyond when the term of employment ended.[72] In

[71] James v. Wilson, 98 S.W.3d 875 (Ky. App. 2002)
[72] Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840 (Ky. 2005).

addition, the Sixth Circuit had "recently acknowledged that Kentucky law does not support the proposition" of a special relationship and duty to warn in similar circumstances.[73]

The Court dismissed the action.

SCHOOLS

C.S., A Child Under Eighteen v. Com.
2010 WL 985303 (Ky. App. 2010)

FACTS: The Murray Independent Schools took out DPS truancy allegations about CJS and CNS, sisters, for unexcused absences and tardiness. The form indicated no other investigation was done. At the hearing, their mother testified that she thought the physician sent a fax. Apparently the complaints were sustained because an appeal was taken.

ISSUE: Are home investigations required before an allegation of truancy?

HOLDING: Yes

DISCUSSION: The pair argued that KRS 630.060(2) was not followed prior to the initiation of the truancy complaints. The Court agreed that although truancy is not a criminal offense, it "can have severe consequences for the child." The Court noted that T.D. v. Com. had found the duties listed in the statute to be mandatory and must be met as a prerequisite to bringing a child before the court as a habitual truant."[74] In situations where home visits are not possible and "the ability to ascertain the causes of truancy frustrated by a lack of cooperation by the student, parent, or guardian," it is then "the duty of the court designated worker to determine if an adequate assessment has been performed."

The director argued that since that time, KRS 159.140(1)(f) has been amended and home visits are not longer obligated except in certain circumstances. However, the Court noted that the statute did not amend the requirement to perform the home visit when a truancy allegation was anticipated.

The decision adjudging the girls as habitually truant was vacated.

OPEN RECORDS

Central Kentucky News-Journal v. George
306 S.W.3d 41 (Ky. 2010)

FACTS: The Central Kentucky News-Journal filed suit to gain access to confidential settlement agreements involving sexual harassment and employment in the Campbellsville Independent School District. The parties had engaged in private mediation and reached a settlement that they agreed would be confidential. The Taylor Circuit Court judge (George) dismissed the cases pursuant to the settlement and sealed the records.

[73] Mackey v. U.S., 247 Fed. Appx. 641 (6th Cir. 2007).
[74] 165 S.W.3d 480 (Ky. App. 2005).

The News-Journal made an Open Records request, and was denied, with the Taylor court decision cited. The News-Journal appealed to the Attorney General, who opined that the agreements were public records subject to the Act, but concluded the authority to actually order them released was limited by the court's decision.

The News-Journal sought to intervene in the Circuit Court actions to assert its right to the settlement agreement. The trial court reviewed the agreements and determined that the newspaper did not "hold a strong and legitimate interest in the terms of the agreements so as to warrant its intervention."

The News-Journal requested a writ of mandamus, and the Court of Appeals agreed that, under the Courier-Journal and Louisville Times Co. v. Peers, that the newspaper "was entitled to intervene and participate in a hearing on the underlying merits of its claims."[75] However, the Court of Appeals ruled that the documents could remain private and the newspaper further appealed.

ISSUE: May settlement agreements involving public money, even if confidential, be held back in an Open Records request?

HOLDING: No

DISCUSSION: In a case of this nature, it was to the newspaper to "first demonstrate that it is without an adequate remedy by appeal or otherwise and that great injustice and irreparable injury would result without issuance of the write before the Claim of Appeals would consider the merits of its claim." However, Peers made the news media an exception to the usual rule, because the First Amendment places the "news media in a unique position in demanding access to court proceedings…"[76]

The Court found it "beyond question" that the agreements are public records for purposes of the ORA. Further, in Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader, it had held that the "Open Records Act required public disclosure … notwithstanding the agreements' confidentiality provisions" in a similar proceeding.[77] Because the agreements in question involve "the expenditure of public funds, the public's interest in the outcome" was strong, and little weight could be given to the plaintiff's desire to keep it secret. That case emphasized that the law states "in the clearest of terms that it is more important that [the public] have access to this type of information than that it remain confidential."

Further, since the settlement was made out of an insurance trust, "the premiums for which had to have been, at least indirectly, paid with public tax money," the Court stated that any personal interest was negated.

The Court also addressed the personal privacy interests in keeping such agreements confidential, but again found that the public's interest outweighed any such personal considerations. The agreements "do not contain any of the underlying details of the claims they purport to resolve that could expose Moss or others to the risk of serious personal embarrassment of [sic] humiliation." The "scant personal identifiers … could have been easily redacted."

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[75] 747 S.W.2d 125 (Ky. 1988).
[76] See also Branzburg v. Hayes, 408 U.S. 665 (1972); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).
[77] 941 S.W.2d 469 (Ky. 1997).

The Court remanded the case to the trial court with orders to release the settlement agreements.

NOTE: A few days after the decision was handed down, the Central Kentucky News-Journal reported that the two settlements in question involved a payment of $100,000 to the plaintiff.

SIXTH CIRCUIT

FORFEITURE

U.S. v. Real Property located at 2621 Bradford Drive, Middletown, Butler County, Ohio.
2010 WL 915908 (6th Cir. 2010)

FACTS: The United States brought an *in rem* forfeiture action against the property in question as a result of the occupant being convicted of marijuana cultivation and trafficking. The Trust (of which apparently the resident was a member and which actually owned the property) contested the forfeiture.

ISSUE: Is a claim of "innocent ownership" enough to save a property from forfeiture?

HOLDING: No

DISCUSSION: The Civil Asset Forfeiture Act of 2000 (CAFRA) puts the burden on the government to prove that the property in question is subject to forfeiture. The Trustee of the Trust (who shared the same last name as the resident) did not deny that marijuana was being cultivated on the property, but argued that the Trust was an "innocent owner." "Innocent ownership is an affirmative defense on which the claimant bears the burden of proof to show by a preponderance of the evidence that she lacked knowledge of the illegal activity."

The Trustee admitted that she visited the property numerous times, "on which marijuana was openly and extensively cultivated." She had posted bond for the resident, her son, on marijuana charges previously and admitted knowledge of his continuing use of marijuana.

The court upheld the forfeiture.

CONSTRUCTIVE POSSESSION

U.S. v. Spencer
364 Fed.Appx. 197 (6th Cir. 2010)

FACTS: On July 14, 2005, Kentucky UNITE officers executed a warrant on Spencer's home, following several undercover buys at that location. Spencer had $5,000 in cash in his wallet and also had a large quantity of Tylox, Hydrocodone, Fentanyl and marijuana, among other items. A rifle and ammunition was also found in the master bedroom. A number of other long guns and ammunition were also found in the house. Spencer was charged with drug trafficking and possession of the firearms, as he was a convicted felon. He was convicted and appealed.

ISSUE: Is proximity sufficient to prove constructive possession?

HOLDING: Yes

DISCUSSION: The only element in dispute was the possession of the firearms. Spencer argued that he was not in either constructive or actual possession, but the Court quickly concluded the facts indicated otherwise. He did not deny that personal items in the room were his, nor that ammunition was readily available for most of the guns. Everything supported the reasonable inference that he had knowledge of and control over the firearms.

Spencer's conviction was affirmed.

ARREST

U.S. v. Collins
359 Fed.Appx. 639 (6th Cir. 2010)

FACTS: On August 30, 2007, Deputy Craycraft (Clark Co. SO, Ky) received a contempt bench warrant for Collins, who had failed to respond to an order to have a mental health evaluation. The warrant included a notation that "this person is mental and could be possible trouble - when attempting to serve take 3 deputies." Craycraft and three other deputies went to Morefield's home (Collins's girlfriend's) home. Morefield at first denied Collins was there, but then admitted he was sleeping in another room. Morefield offered to get him, but Craycraft refused, stating "we'll get him." There was dispute as to whether Morefield actually gave consent for the deputies to enter. The deputies entered, found Collins and arrested him. They spotted two rifles in a gun rack in the same room and seized them. (Morefield later delivered another firearm that belonged to him.)

Collins was charged with possession of firearms by a felon. (Other charges were dismissed.) Collins moved for suppression, which the judge denied. Collins took a conditional guilty plea and appealed.

ISSUE: May officers enter a home on a misdemeanor arrest warrant when thy have probable cause the subject is inside?

HOLDING: Yes

DISCUSSION: Collins first argued that a misdemeanor bench warrant for contempt of court was somehow different from other arrest warrants, or that officers could not enter a residence to serve such warrants. The Court disagreed and found the warrant valid. The Court also found that it was appropriate for officers to enter a home when they have probable cause to believe that a suspect is inside.[78] Further it held that it was "well-established that law enforcement officials have authority to enter a residence in order to execute an arrest warrant if there is probable cause to believe the person named in the warrant is inside."

The Court affirmed the lower court's decision.

[78] U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008); Payton v. New York, 445 U.S. 573 (1980).

SEARCH & SEIZURE - WARRANT

U.S. v. Warren
2010 WL 545496 (6th Cir. 2010)

FACTS: On the day in question, a local prosecutor (Guinn) assisted Officer Burnett draft a search warrant affidavit for a residence in Flint, Michigan. When the affidavit was presented to the judge, the judge "noticed several inaccuracies and ambiguities." When asked, later, about the problems, the officer explained that the prosecutor "drafted the warrant by modifying a form affidavit and neglected to change the boilerplate language in several paragraphs." The reviewing judge had made certain changes by hand, with the officer's approval and assistance, but some inaccuracies remained. Some of the changes were initialed, but not all.

The warrant had been served and drugs seized. Warren was indicted and moved to suppress. When the motion was denied, Warren took a conditional guilty plea and appealed.

ISSUE: May a judge make corrections to a warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court agreed that there were problems with the warrant and reviewed it under U.S. v. Leon.[79] Warren contended that the judge's actions caused him to "abandon his neutral judicial role," but the Court, although agreeing the judge's actions were "unconventional" but noted he did not simply rubber stamp the affidavit. "On the contrary, by scrutinizing the veracity of the affidavit and making alternations to ensure its accuracy, he executed his Fourth Amendment duty 'with a critical eye.'"

In addition, Warren argued the affidavit failed to "establish a nexus between the drug deal and the residence," but the court pointed to the officer's observation of Warren's actions in connection with the sale and found that satisfied the standard.

The Court upheld the denial of the motion to suppress.

U.S. v. Sprague
2010 WL 545496 (6th Cir. 2010)

FACTS: On Aug. 19, 2005, Kingsport (TN) PD officers got a search warrant for Sprague's apartment, based upon an affidavit by Det. Adkins. The warrant asserted that Sprague was not in compliance with sex offender registration and that he had committed perjury. Specifically, Sprague was barred from associating with children, but was playing the role of Santa Claus. He was also seen to be driving multiple vehicles, although he swore he had only one, and he claimed responsibility for two daughters who lived with him, although he was prohibited from living with minors.

Officers searched his home and found pornographic material and a large amount of cash, as well as computer equipment. When leaving the apartment, Det. Adkins spotted Sprague and stopped him on an active FTA warrant. He was told of the search of his home and consented to a search of his storage unit.

[79] 468 U.S. 897 (1984).

He stated he was living with a woman, and upon confirmation, a search warrant was obtained for her home. The computer was searched based upon a separate search warrant.

Sprague was indicted and moved for suppression, arguing, apparently, that he didn't live in the first apartment. When that was denied, he took a conditional guilty plea to possessing child pornography and appealed.

ISSUE: Does an allegation of a false statement in an affidavit invalidate the warrant?

HOLDING: No

DISCUSSION: Sprague argued first, that the apartment was not his primary residence, and that the affidavit was materially false in that respect. He also argued that the "the purpose of the search was to uncover child pornography, not to investigate the alleged violations of Defendant's obligations to register as a sex offender."

The Court continued:

> The question of whether the apartment was Defendant's primary address is easily resolved. As a preliminary matter, Detective Adkins never swore in the affidavit that it was his primary residence. The affidavit stated that the Prospect Drive apartment was "resided in or occupied and possessed by" Defendant, not that it was his primary residence. The apartment was undoubtedly still possessed by Defendant, and even if he were usually staying at Conley's place, he still had a large number of possessions at the Prospect Drive apartment, including an outdoor cat. Additionally, Defendant received a Section 8 voucher, which is only available for a primary residence, for the apartment. He stated that the apartment was his address on all of his registration forms to register as a sex offender as well as other sworn legal documents.

One of the witnesses testified that the apartment was such a mess that no one could live there, but there was no indication that she told that to the affiant officer. Further, the fact that an indictment was issued does not end the investigation and evidence of his contact with children (the Santa Claus suit) was sought in the search.

The court agreed:

> It is possible that the officers were hoping to find child pornography on the computers, but we are unaware of any principle of law that a search warrant issued based on credible allegations of illegal activity is invalid where the officers hope to find information of additional criminal activity.[80]

The Court discounted a suggestion by one of the witnesses that one of the detectives had been seen at the apartment prior to the warrant being issued, finding that witness essentially incredible.

Sprague's plea was affirmed.

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[80] See Whren v. U.S., 517 U.S. 806 (1996)

U.S. v. Khami
362 Fed.Appx. 501 (6th Cir. 2010)

FACTS: Khami's home in Detroit became the focus of two separate drug trafficking investigations. The investigation led by ICE did not result in a search warrant for that agency, but did contribute to a search done by a task force, CHIEF. Khami was mistakenly linked to the investigation as he was believed to be the "Arab male" described by a witness as being involved in the trafficking. The transactions took place near Khami's home, "but not at that location." The description given of the location where the drug transaction took place was not the same, however.

Officers obtained a search warrant for Khami's home. During the search, officers found a gun. Khami argued, however, that:

> Willis [the witness] describes the house as South of 7 Mile Road; Mr. Khami's house is North of 7 Mile Road. Willis describes the house as a "two-family flat"; Mr. Khami's home is a single-family dwelling. Willis describes the house as being "beige brick"; Mr. Khami's house has white aluminum siding on it. Willis describes the house as being located "near the corner"; Mr. Khami's house is in the middle of his block

Khami was indicted for being a felon in possession of a firearm. He moved for suppression, and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an allegation of a false statement automatically require a Franks hearing?

HOLDING: No

DISCUSSION: The Court noted that the search warrant affidavit consisted of the following:

> First, the CHIEF investigator alleged that in his lengthy experience in law enforcement and in drug investigations, the articles sought in the search warrant are the kind of evidence usually recovered from homes of people who are suspected of involvement in drug trafficking. The affidavit then details the CHIEF surveillance of three vehicles believed to be involved in narcotics trafficking which led to the recovery of 9,500 ecstasy pills in a traffic stop of two of the vehicles. The affidavit then discusses using the license plate number of vehicle #3 to determine the registered address, and law enforcement officers then going to that address and observing the black male previously seen participating in the three-vehicle transaction. That male was followed to 19168 Havana Street where he met with an Arab male who had come from inside the home. Then the affidavit discusses information obtained from Willis, one of the defendants arrested in the traffic stop of the first two vehicles which describes the drug transaction that occurred at an unknown house, and then alleges that Willis identified Defendant as the Arab male involved in that transaction and identified 19168 Havana Street from photographs as near the location of the drug transaction. The affidavit concludes with allegations that Defendant lists 19168 Havana Street as his address on his driver's license and that Defendant has two prior drug convictions.

Specifically, there was a nexus to the house because officers saw the driver of a vehicle involved in the transaction go to Khami's home. Standing alone, that would not have been sufficient, but it did "lend credibility" to the identification given by the witness of Khami.

Khami argued that the affidavit was "intentionally misleading" because it left out "material facts that would have defeated probable cause" As such, he argued, he was entitled to a Franks hearing.[81] The Court noted that the "standard for obtaining a Franks hearing is higher for a claim of material omission than for an allegedly false affirmative statement," because "criminal investigations are usually fast-paced and have many sources of information that may not all be recognized as equally important to the officers involved."[82] In this case, there were two investigations working in tandem, and facts known to one may not have been known to officers involved in the other.

Khami also argued that it was unconstitutional to prohibit a firearm from having a weapon, but that argument was quickly overridden by the court.

Khami's conviction was affirmed.

SEARCH & SEIZURE - TERRY

U.S. v. Noble
364 Fed.Appx. 961 (6th Cir. 2010)

FACTS: On November 23, 2006, Officer Budny and Kitko (Cleveland OH PD) saw Noble sitting in a car under a no stopping sign. The car was running. They pulled behind him and activated their emergency equipment - "Noble reacted by putting his hands in the air." Officer Budny obtained Noble's OL and returned to the car to run checks. He told Officer Kitko he thought he smelled marijuana but wasn't sure (he was congested) so they both walked to the car, with Kitko on the driver's side. Kitko confirmed the odor and asked Noble to get out. He asked about a weapon, but Noble did not respond.

Kitko patted Noble down, and felt a bag which Noble agreed was marijuana. Kitko also felt objects in his other pocket which he believed to be cocaine and money. He lifted Noble's coat and saw a gun. Kitko placed him under arrest. Noble was indicted in Ohio for the gun (he was a felon), drug trafficking and related offenses, as well as the illegal parking. However, once he was indicted by the federal courts for the weapon and the cocaine, Ohio dismissed the state charges.

In January, 2007, ATF agents went to Noble's home to interview him. They knew he had already been indicted by Ohio, that he had a lawyer, and that he also had a pending federal indictment. Noble asked if "he should have his attorney present." They told him "they could not give him legal advice, and they read him his Miranda rights and a waiver." Noble signed the waiver and eventually admitted to the crimes. He said he "did not want to make a written or recorded statement without his attorney being present.

Noble later moved for suppression of the evidence found during the pat-down, and from his interview, that was denied. He took a conditional guilty plea and appealed.

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[81] Franks v. Delaware, 438 U.S. 154 (

[82] U. S. v. Fowler, 535 F.3d 408 (6th Cir. 2008) (citing U.S. v. Graham, 275 F.3d 490 (6th Cir. 2001), U. S. v. Sawyers, 127 F. App'x 174 (6th Cir. 2005)).

ISSUE: Is a frisk during a traffic stop permitted, if the officer has reasonable suspicion the individual is in possession of marijuana?

HOLDING: Yes (but see discussion)

DISCUSSION: The court quickly discarded Noble's argument that the no-stopping sign was not in effect on the day he was arrested, because it was Thanksgiving. The Court agreed that although no-parking regulations were not in effect on holidays, that no-stopping rules were still in effect. It did not matter that the stop was pretextual. The belief that he was under the influence of marijuana justified a longer detention than a simple traffic citation would have warranted, as well. With respect to the frisk, the Court agreed "Although an officer does not have the authority to automatically perform a pat down of a person stopped for a vehicular violation, we have found, in comparable situations, that a pat down during a traffic stop is reasonable when additional facts are present which indicate that the person may be armed."[83] Although belief that Noble had marijuana was not enough for an officer to be certain that he was armed, it was certainly enough to satisfy the reasonable suspicion standard, particularly when combined with the officer's experience and Noble's lack of response to the question. The Court found the weapon was admissible.

With respect to the statements, Noble argued that invoking his right to counsel on state charges invoked those rights on the federal charges, as well. Apparently, at the time he was questioned, however, the state charges had been dismissed. The Court concluded that "the state charges did not invoke his Fifth Amendment rights, but only invoked his Sixth Amendment rights with respect to those charges."[84] Further the Court ruled that "Noble's Sixth Amendment right to counsel on the state charges was extinguished by the state's dismissal of those charges."[85] He had no "active" Sixth Amendment right to counsel at the time of the interview. (Apparently the federal authorities had requested an indictment, but it had not yet been returned at the time of the interview.)

Noble's plea was upheld.

SEARCH & SEIZURE - VEHICLE STOP

U.S. v. Mansur
2010 WL 1140996 (6th Cir. 2010)

FACTS: On July 8, 2007, at about 10:40 in the evening, Officers Trentman and Khayo (Springfield Township PD) were patrolling a high crime area. They pulled into an open gas station and spotted a van with the license plate propped in the back window. Officer Trentman checked the tag and found it belonged on another vehicle. They waited for the vehicle to move out onto the roadway, but the occupant, who was initially pumping gas, kept watching the cruiser. When they realized the van wasn't going to leave, the made a traffic stop of it where it was parked. Officer Trentman approached and asked Mansur about the plate. He stated he'd purchased it. Officer Trentman later testified that he "intended to arrest Mansur" for the felony offense of possession of the plate, although it had not actually been reported stolen.

[83] U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).
[84] McNeil v. Wisconsin, 501 U.S. 171 (1991).
[85] Cato-Riggs v. Yukins, 46 F. App'x 821 (6th Cir. 2002); U.S. v. Montgomery, 262 F.3d 233 (4th Cir. 2001). See also U.S. v. Toepfer, 317 F. App'x 857 (11th Cir. 2008), U.S. v. Martinez, 972 F.2d 1100 (9th Cir. 1992).

Officer Khayo ran Mansur's identity, and learned he had a criminal past. Officer Trentman searched Mansur's person and found a firearm. As he was a convicted felon, Mansur was charged in federal court with weapons offenses. Mansur requested suppression, which was denied, and ultimately took a conditional guilty plea. He then appealed.

ISSUE: Is it reasonable to believe that vehicle at a gas station has recently been on the roadway?

HOLDING: Yes

DISCUSSION: The Court agreed, first, that the traffic stop was justified. The vehicle's location gave them probable cause to believe it had recently been driven on the roadway. As such, Mansur's arrest was also lawful. Because that was lawful, the ultimate seizure of the gun was, as well.

Mansur's plea was affirmed.

SEARCH & SEIZURE - WARRANT

U.S. v. Castro
364 Fed.Appx. 229 (6th Cir. 2010)

FACTS: In May, 2007, Det. Matos (Cleveland PD) was watching Castro's neighborhood, as it was known to be a hot spot for drug activity. On May 22, she saw Castro and another man commit a traffic offense and then saw Castro get out of the car, enter the residence and return. She broadcast its location so that a marked car could make the stop. Sgt. Kelly and Det. Fallon made the stop, with the assistance of a marked car. Sgt. Kelly asked the driver for a license, which he did not have. Sgt. Kelly saw a small piece of folded paper with what appeared to be narcotics spilling out. Det. Fallon was removing Castro from the car as well, and found a similar piece of paper. He patted down Castro and found a bag of heroin. Castro was arrested.

Sgt. Kelly contacted Det. Matos, who decided to seek a warrant for Castro's home. They contacted the prosecutor and obtained a warrant. Other officers secured Castro's home, finding Castro's mother present. She allowed the officers to enter. Sgt. Kelly spotted a scale. The officers made a protective sweep and Sgt. Kelly found a rifle in the closet. Det. Matos called when the warrant was signed and an additional search was done at that time, during which weapons, ammunition, scales and more heroin were found.

Castro challenged the warrant. It was later determined that Det. Matos's affidavit incorrectly indicates that Castro was identified through a confidential informant, in fact, "an anonymous source provided the tip." When challenged, the trial court "struck the reference to a confidential informant from the affidavit, and examined the affidavit as though the tip had come from an anonymous source. It concluded that there was still sufficient evidence to support the warrant. The warrant was upheld. Castro took a conditional plea and appealed.

ISSUE: If incorrect information is in a warrant, is it appropriate to consider the warrant without that information to determine if it is still valid?

HOLDING: Yes

DISCUSSION: Castro "argued that the district court erred by inserting the correct information into the warrant affidavit rather than simply striking the "recklessly false information." The Court looked to Elkins[86] for guidance, and concluded that "having struck the false reference to a confidential informant from the affidavit, the district court properly read the remainder of the affidavit as though the tip had come from an anonymous source." The Court agreed that the remaining portions of the search warrant were enough to find probable cause.

The Court upheld the denial of the motion to suppress.

U.S. v. Brooks
594 F.3d 488 (6th Cir. OH 2010)

FACTS: On October 10, 2006, Lt Rhoades and Officer Kilgore were executing search warrants during a drug task force operation in Ohio. When they went to Brooks' home and knocked, he answered. He was arrested and placed in custody. At that time, the officers detected a strong odor of marijuana "wafting from the residence." (Apparently they did not have a warrant for Brooks' home.)

Brooks said he needed shoes, so Lt. Rhoades accompanied him to the bedroom. There, he saw an ashtray that contained marijuana seeds. During the search incident to his arrest, the officers found $1,000 in cash.

> At this point, most readers will assume they know what comes next—the officers immediately search the parts of the bedroom not in plain view, find more contraband, and then go get a search warrant. Surprisingly, and encouragingly, this is not the case.
>
> Instead, the officers took Brooks out of the residence and froze the scene. They then met with other METRICH officers and prepared an application for a warrant to search the residence. The key aspect of a search warrant application is the affidavit submitted to the magistrate to establish probable cause. The officers prepared the affidavit with the assistance of other members of the METRICH team, and Lieutenant Rhoades ultimately executed the affidavit. This is where Brooks says the problem arose.
>
> The affidavit cannot be praised for its technical perfection. It is clearly a cut and-paste job. There is a second paragraph 9 *after* paragraphs 10 and 11, and paragraphs 10 and 11 are relics from an affidavit used for a completely different case. Although sloppiness may raise flags, it is not in any way fatal because search warrant affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation."[87] What matters is the information contained in the affidavit. In this case, the material paragraphs are as follows:
>
> *1. The affiant has been a police officer for over thirty four years with the Richland County Sheriff's Office and is presently assigned as a shift supervisor with road patrol*

[86] Elkins v. U.S., 364 U.S. 206 (1960)
[87] U.S. v. Ventresca, 380 U.S. 102, 108 (1965).

2. On December 21, 2001, XXXXXXX contacted members of the METRICH Enforcement Unit and stated that Lyna Brooks, D.O.B. 05/30/76, S.S.N. xxx-xx-xxxx of 135 Vale Avenue, Mansfield, Richland County, Ohio, was trafficking in drugs. RM47928.
3. On March 25, 2002, XXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks of 135 Vale Avenue, Mansfield, Richland County, Ohio was trafficking in cocaine and crack cocaine.
4. On March 30, 2001, XXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks was trafficking in crack cocaine.
5. On July 8, 2005, XXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks of 135 Vale Avenue, Mansfield, Richland County, Ohio is trafficking in crack cocaine.
6. On February 8, 2005, XXXXXXX contacted the METRICH Enforcement Unit and stated that drugs were being sold from the residence located at 135 Vale Avenue, Mansfield, Richland County, Ohio
7. On February 20, 2006, XXXXXX made a controlled drug buy of crack cocaine for the METRICH Enforcement Unit from Lyna Brooks. The evidence was submitted to the Mansfield Police Department Crime Laboratory and tested positive for cocaine base.
8. On February 21, 2006, XXXXXXXX made a controlled drug buy of crack cocaine for the METRICH Enforcement Unit from Lyna Brooks. The evidence was submitted to the Mansfield Police Department Crime Laboratory and tested positive for cocaine base.
9. On October 10, 2006, the affiant, made contact with Lyna Brooks at his residence located at 135 Vale Avenue, Mansfield, Richland County, Ohio in reference to an Indictment for Aggravated Trafficking in Crack Cocaine. Brooks was placed under arrest. The odor of marihuana was strong in the residence. When the affiant took Brooks into his bedroom to get shoes there were marihuana seeds located in the ashtray in plain view Brooks stated this bedroom belonged to him and was on the first floor, south side of the house. In Brooks rear hip pocket was $ 1,000 in United States currency. Brooks refused a consent to search. [paragraphs 10 and 11 are omitted]
9. [should be paragraph number 12] In the past C.I. 00-28 has provided valuable information to the METRICH Enforcement Unit which has been independently corroborated and proven reliable. C.I. 00-28 has also made controlled purchases for the METRICH Enforcement Unit which has resulted in the arrest and conviction of individuals on a variety of violations of the Ohio Revised Code.

In summary, the affidavit sets up the affiant's qualifications in paragraph 1. Then, in paragraphs 2 through 8, the affidavit describes a series of drug-related interactions with confidential informants that range from five years to six months before the date of the affidavit. In the first paragraph 9, the affidavit discusses what the officers observed that same day when they executed the arrest warrant on Brooks. Paragraphs 10 and 11 are irrelevant because they were left over from a different case. Finally, in the second paragraph 9, the affidavit attempts to establish the credibility of at least one of the confidential informants.

Upon Brooks's motion to suppress, the District Court concluded that the evidence in the affidavit was stale and insufficient to support probable cause, suppressing the evidence. The government appealed.

ISSUE: Must an affidavit establish a connection (nexus) between the location named in the warrant and the items sought?

HOLDING: Yes

DISCUSSION: At issue is whether the affidavit supported the probable cause needed to issue the affidavit. The Court reviewed the standards, noting, for example that "when a warrant applicant seeks to search a specific location," the affidavit must establish "a nexus between the place to be searched and the evidence to be sought."[88] Further, "[t]he critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought."[89]

Finally, "in seeking to establish probable cause to obtain a search warrant, the affidavit may not employ 'stale' information, and whether information is stale depends on the "inherent nature of the crime."[90] Whether information is stale in the context of a search warrant turns on several factors, such as 'the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and] the place to be searched (mere criminal forum of convenience or secure operational base?).'"[91] "In the context of drug crimes, information goes stale very quickly "because drugs are usually sold and consumed in a prompt fashion."[92]

> The Court ruled that it believed the analysis starts and ends with the information in the first paragraph, as that information easily satisfies all of the requirements of a proper search warrant affidavit. It recounts Lieutenant Rhoades's first-hand observations of things in the residence the same day as the affidavit was executed. Thus, the information clearly establishes the requisite nexus between the place to be searched and the evidence sought, and the information is unquestionably fresh. This leaves only the question of whether the information in the first paragraph gives rise to a fair probability that a search will uncover contraband or evidence of a crime.

The Court agreed that "it fairly probable under these facts that where there is smoke, there may be more there to smoke." The cash only emphasized the likelihood that more contraband might be found in the house. The Court concluded that the information in the first paragraph, alone, was sufficient to provide the necessary probable cause.

The trial court's decision was reversed and the case remanded.

U.S. v. Smith
594 F.3d 530 (6th Cir. 2010)

[88] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).
[89] Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
[90] U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998) (quoting U.S. . Henson, 848 F.2d 1374 (6th Cir. 1988)).
[91] U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2006) (quoting U.S. v. Greene, 250 F.3d 471 (6th Cir. 2001)).
[92] U.S. v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009).

FACTS: On November 21, 2006, at about 3 a.m., Cincinnati officers responded to a 911 call at an apartment complex. Officer Putnick and Rock arrived first and waited for backup, Officers Hill and Weyda. They could not immediately enter because the exterior door was locked. The tried various ways to get in - "ringing the door buzzers, knocking on windows, making noise (in particular, through the horn attached to their vehicle), using searchlights, and having dispatch try to contact the residence from which they had received the 911 call." Officer Putnick even climbed up the fire escape to bang on second floor windows. Finally, they saw Smith come through the lobby , rolling his bike, and he allowed the officers to enter. However, some type of altercation arose, and the officers took up a "tactical position" around Smith - he tried to push out as they were coming in. They questioned Smith, who was evasive and kept trying to leave. The officers asked him to "slow down." Smith answered some questions and kept trying to roll his bike past the officers. Officer Weyda indicated he could hear Officer Rock asking questions but could not hear Smith's responses. At some point, one of the officers apparently grabbed a firearm from Smith's waistband, and handed it off to another officer.

Smith, a convicted felon, was charged in federal court for possession of the firearm. Smith moved for suppression and was denied, he then appealed.

ISSUE: Is a brief seizure of someone leaving a building where a 911 call has been generated appropriated?

HOLDING: Yes

DISCUSSION: The Court reviewed the standards for deciding if a seizure actually occurs - "the encounter must not be consensual and the officers must use physical force or the individual must submit to the officers' show of authority."[93] "[A] consensual encounter becomes a seizure when 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"[94] In the past, the Court had "noted that, "[c]ircumstances indicative of a seizure include 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'"

Further:

> However, absent the intentional application of physical force, even if there is a show of authority and a reasonable person would not feel free to leave, in order for a seizure to occur there must also be submission to the show of authority: "there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." Concerning submission, the Court noted that: "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away."

The Court agreed that an "investigatory stop of an individual by a law enforcement officer is proper so long as there is a reasonable basis for the stop.": An officer can stop and briefly detain a person when the

[93] Brendlin v. California, 551 U.S. 249 (2007); California v. Hodari D., 499 U.S. 621 (1991).
[94] U.S. v. Jones, 562 F.3d 768 (6th Cir. 2009) (quoting U.S. v. Mendenhall, 446 U.S. 544 (1980)).

"officer has reasonable, articulable suspicion that [a] person *has been*, is, or is about to be engaged in criminal activity."[95] However, to justify a Terry stop, an "inchoate and unparticularized suspicion or 'hunch'" is not sufficient. Instead, the officer must be "able to articulate some minimal level of objective justification for making the stop," based upon "specific reasonable inferences which he is entitled to draw from the facts in light of his experience,"[96] This determination balanced the individual's personal interest in security with the government's interest in addressing crime.

The Court concluded that Smith was not seized before he was ordered by one of the officers to stop. Officers are permitted to ask questions absent any reasonable suspicion.[97] They can "position themselves immediately beside and in front of a suspect and even reach across a suspect, provided they leave a way out.

Continuing on, the Court stated:

> Thus, the fact that uniformed police officers here were asking Smith questions while surrounding him on both sides, in close physical proximity, with another officer at some distance in front of him, did not make the encounter non-consensual. Indeed, the fact that three officers rushed into the building as Smith opened the door may have given Smith some cause for alarm. However, it is more significant that the officers did not initially seek to arrest or stop Smith as they entered the building. They did not block Smith in; instead, they merely tried to move around and past him. This would have indicated to a reasonable person that the officers were not trying stop him and that, unless he engaged in activity that generated a reasonable, articulable suspicion, he was free to leave. Certainly, the officers were not required to allow Smith out of the building before attempting to respond to an emergency 911 call; however, their need to enter the building quickly did not mean that a reasonable person would feel that he could not leave or that their initial encounter was non-consensual.

In addition:

> … the officers did not use physical force to restrain Smith until they grabbed him when he reached into his jacket (after Officer Putnick told Smith to stop). Prior to that point, there is no evidence of any physical contact, and any physical contact would have been unintentional and a byproduct of the hallway's small parameters and the officers' efforts to enter quickly in response to the 911 emergency call (the officers did not physically block Smith in). Furthermore, even assuming that the officers made a show of authority when they surrounded Smith in the hallway in close physical proximity as they attempted to enter the building, Smith did not passively acquiesce or submit to their show of authority but, instead, tried throughout the encounter to push past the officers. Continuing efforts to push past the officers do not constitute submission to a show of authority. Consequently, there was no seizure at this point.

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[95] U.S. v. Atchley, 474 F.3d 840 (6th Cir. 2007) (quoting U.S. v. Hensley, 469 U.S. 221 (1985)) (emphasis in original); see also U.S. v. Sokolow, 490 U.S. 1, (1989)
[96] U.S. v. Foster, 376 F.3d 577, (6th Cir. 2004)
[97] U.S. v. Drayton, 536 U.S. 194 (2002)

Once Officer Putnick told Smith to stop, the interaction turned into a seizure and a Terry stop. That stop was justified "because the officers had a reasonable suspicion of criminal activity under the totality of the circumstances, which included: (1) the emergency 911 call; (2) Smith's efforts, with his head down, to push past the officers and exit the building as the officers entered; (3) that these events took place in a high-crime area in (4) the very early hours of the morning; and (5) Smith's vague responses to the officers' questions."

Smith contended:

> … that the 911 call is not a significant factor in considering the totality of the circumstances. Smith argues and the district court appears to have assumed that the emergency 911 call was a silent or hang-up 911 call.[98] In examining the 911 call, this court has found that a 911 hang-up call "standing alone without follow-up calls by a dispatcher or other information, is most analogous to an anonymous tip." *Cohen* noted that a "silent 911 hang-up call could be said to have suggested the possibility of, among other things, a limited 'assertion of illegality' but, absent any observed suspicious activity or other corroboration that criminal activity was afoot," even that limited assertion could not be accepted. The police officer who testified in that case stated that a person had called 911, but that the person had hung up "right after they dialed 911" without providing any additional information. Thus, Cohen indicates that a silent 911 call can provide some support for a reasonable suspicion of criminal activity but, by itself, cannot support a finding that the law enforcement officers had a reasonable suspicion of criminal activity.
>
> Therefore, even if we found that this was a silent 911 call, it offered a limited "assertion of illegality" which, in conjunction with other factors, could provide the officers with reasonable suspicion. However, in this case, Officer Hill testified that some additional information was communicated with the 911 call: "I recall the dispatcher saying it sounded like it was a struggle inside of the apartment building because the line was still open." This information narrowed the inferences as to what caused the emergency 911 call, suggested criminal activity and, given the small number of apartments in the residential complex (*i.e.*, there were 12 buzzer buttons or 12 listings for names) and the time of night, significantly increased the probability that Smith might have been involved in criminal activity. Furthermore, Smith's refusal to move out of the way of the officers and his efforts to push through them as they tried to enter the building and as they moved around him, also supported a finding of reasonable suspicion. The Supreme Court has found
>
> that flight from law enforcement officers in a high crime area can justify a reasonable suspicion of criminal activity.[99] Furthermore, this court has found that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[100]

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[98] U.S. v. Cohen, 481 F.3d 896, 899-900 (6th Cir. 2007) (noting that a silent 911 call may be made for numerous, non-criminal reasons and that "without any information from the caller, the silent 911 hang-up call was the equivalent of an anonymous 911 report that there might be an emergency, which might or might not include criminal activity, at or near the address from which the call was made").

[99] Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

[100] Caruthers, 458 F.3d at 466 (citing Wardlow, 528 U.S. at 124) (finding that Caruthers's action of "'hurr[ying]' away in a 'semi-running' manner" while not the same as "headlong flight" was still a relevant consideration in examining the reasonableness of an investigatory Terry stop).

Moreover, "flight is not the only type of 'nervous, evasive behavior.' Furtive movements made in response to a police presence may also properly contribute to an officer's suspicions."[101]

Here, the officers described Smith throughout the encounter as very agitated and unsettled. More importantly, Smith did not merely run from the officers; instead, he stood in their way, with his head down, and attempted to push through them and past them. When they sought to enter the building, the police were not trying to investigate or intimidate Smith, they were not purposefully seeking to slow him down or to inhibit his movements; rather, they were seeking to respond as quickly as possible to a 911 emergency. In response, Smith did not get out of their way, or simply stand still; instead, and without any explanation, he attempted, with his head down, to push his way through and past the officers. Smith's aggressive behavior, which inhibited the officers' efforts to respond to a 911 emergency call, distinguishes this case from other Terry stop situations and contributes significantly to our finding that the officers had a reasonable suspicion of criminal activity.

Several other contextual considerations were also present, including that it was "late at night" and "a high-crime area.". Even though "these factors may not, without more, give rise to reasonable suspicion . . . they are relevant to the reasonable suspicion calculus." (the incident in Caruthers took place at 1:20 a.m.). It was reasonable to conclude, based on Officer Putnick's prior testimony regarding his extensive experience in this area (and with this apartment complex, in particular) that this was a high-crime area. Furthermore, 3:00 a.m., like 1:20 a.m. is, as Caruthers described it, "late at night." While activity at such hours and in such an area, by itself, certainly could have an innocent explanation, in conjunction with the other factors, it supported a finding of reasonable suspicion.

Finally, Smith's evasive, non-responsive, and vague answers to the officers' questions, which (in part) prompted Officer Putnick's instruction to stop, also provided some additional basis for the officers' reasonable suspicion. This court has noted that a suspect, "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, *without more*, furnish those grounds."[102] Thus, while a suspect's refusal to answer or listen does not, by itself, justify a reasonable suspicion of criminal activity, it can be a factor that, together with other factors, supports a finding of reasonable suspicion.

Here, Officer Weyda could not remember any of Smith's responses to the questions he was asked. But Officer Hill testified that Smith, "was kind of evasive in his answers" and that he thought that Smith's responses were "vague." Officer Putnick testified that he asked Smith, "How you [sic] doing, sir? Do you live here?" and that Smith "didn't acknowledge me. He just kind of kept his head down and tried to keep walking. At that point when he didn't acknowledge me, my suspicion raised a little bit and I asked him to stop." Smith's refusal to answer some of the questions posed to him, and his vague and

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[101] Id. at 466-67 (noting that this factor must not be "invoked cavalierly" but finding that Caruthers's "unusual posture" of "'hunch[ing] down' near a wall, 'kind of leaning toward the ground'" supported a finding of reasonable suspicion).

[102] U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007) (quoting Florida v. Royer, 460 U.S. 491 (1983)) (emphasis added). We also note that all of these factors were present before the officers had initially positioned themselves around Smith.

evasive answers to other questions, provided further support for the officers' reasonable suspicion that he was engaged in criminal activity.

Finally, when Smith reached abruptly inside his clothing, the officers were justified in reacting and grabbing him. At that point, they saw the weapon and were further justified in seizing it.

The denial of the motion to suppress was affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Phillips
361 Fed.Appx. 679 (6th Cir. 2010)

FACTS: On August 11, 2007, Det. Castillo, a Tennessee drug task force member, along with a team, responded to a complaint at a local hotel. There, they attempted a knock and talk and Phillips answered the door. Castillo later stated that Phillips allowed them to enter, but Phillips disputed that. When the team entered, however, they immediately spotted crack cocaine and a crack pipe. Castillo patted down Phillips at the same time, finding nothing. One of the officers found $60 in cash and a pistol in a nightstand drawer. (Supposedly the officer shined a flashlight around the area, because the room was dark.) Another officer admitted he did not hear an explicit consent.

Phillips was arrested and moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May the Court make a credibility determination on a consent issue?

HOLDING: Yes

DISCUSSION: The Court concluded that the trial court had made a credibility determination, and had found Castillo's assertion that he received consent more convincing. The Court noted that another officer's testimony was "much more consistent with Castillo's testimony than with Phillips' version of events."

Phillips' plea was upheld.

SEARCH & SEIZURE - CUSTODY

U.S. v. West
2010 WL 1324221 (6th Cir. 2010)

FACTS: In 2006, King received a package at her place of employment. She opened it and found "two brick-shaped packages covered in plastic wrap and a white-powder residue." West called her shortly thereafter and told her that the package would be arriving and not to open it. He said "Rocky" would pick it up. She rewrapped the package and left it with someone else at the workplace, as she had to attend an appointment. When she returned it had been picked up. King them told her supervisor about the package. They contacted Det. Teeter (unnamed Tennessee agency). He set up surveillance and found the vehicle

Rocky had been driving. Det. Price followed it when it left the house. (West was driving.) She called for a marked unit to stop the vehicle. Officer Mohney responded and made the stop.

When Officer Mohney approached the car, "West turned toward him quickly, yelling." Since he could not see West's right hand, he ordered West out of the car and secured him in his cruiser. Det. Price arrived, although her version differed slightly from Mohney's. Price detected the smell of unburnt marijuana and called for a dog sniff of the car.

While they were running computer checks on the two men and the car, Sgt. Perry and Xena, the drug dog, arrived. Xena alerted to several areas in the vehicle. Perkins, the passenger, was secured after they found marijuana and a gun. Both were arrested. More marijuana was found in the trunk during an inventory search.

West moved for suppression and was denied. Both stood trial and both testified, giving different versions as to what had occurred. West was convicted of trafficking and related charges, and appealed.

ISSUE: Is being placed in the back of a cruiser automatically an arrest?

HOLDING: No (but it may be custodial)

DISCUSSION: West argued that "Mohney's actions exceeded the legitimate scope of the stop when he detained West in the back of his patrol car." The Court noted that "because Mohney never wrote a speeding ticket" it was "more difficult to determine when the purpose of the initial stop ended." However, the Court noted that since he had not yet obtained West's license and registration when he placed West in the car, he was still "pursuing the purpose of the original stop." The Court noted that the trial court did not make a finding with respect to whether West was handcuffed at that time, a matter which was in dispute, and which the Court noted was a "critical factor to [its] analysis." However, West did not raise an affirmative factual dispute on the issue. The Court noted that it had established in U.S. v. Jacob that simply being placed in the back of a patrol car does not constitute an arrest.[103] The Court found that "the fact that Mohney was the only officer actively on the scene" and was dealing with two persons, one of whom was behaving aggressively, made it reasonable for Mohney to secure the pair in his cruiser. He also used the "least intrusive means reasonable available to verify or dispel [her] suspicion" - "calling for a canine unit."

West's conviction was affirmed.

INTERROGATION

U.S. v. Everett
601 F.3d 484 (6th Cir. 2010)

FACTS: From the opinion:

> Even before he was arrested, April 15, 2008 was shaping up to be a bad day for Mr. Everett. That evening, he had helped his estranged wife (with whom he was in the process

[103] 377 F.3d 573 (6th Cir. 2004).

of obtaining a divorce) move into a new house. At her insistence, Everett had retrieved some of the possessions that he had been storing with her, including a shotgun.

By the time he had finished, it was approximately 8:30 p.m. This being tax day, however, Everett needed to get to the office of Advance Financial, a tax-preparation company, before closing time – which he believed to be 9:00 p.m. – in order to seek help filing for an extension.

A few minutes before 9:00, Detective Morgan Ford, sitting in her patrol car on a Nashville thoroughfare, saw Everett drive by at a high rate of speed. Ford was a member of the Nashville Police Department's "Flex Team," which she described as "an aggressive patrol unit designed to make traffic stops and *Terry* stops in high-crime areas to reduce crime." In other words, as Everett characterizes it, Ford was planning to make "pretext[ual]" traffic stops "with the real purpose of trying to ferret out other types of crime."

Ford followed Everett to the Advance Financial office. As Everett parked, she pulled up next to him with her lights on and approached his vehicle. At that point, if not before, Ford would have seen that Everett was a middle-aged African-American male. She asked Everett (who was still in his car) for his license, registration, and proof of insurance. Everett admitted that his license was suspended, but produced alternate identification and proof that he was in the process of paying off the required fines to get his license back. At that point, Ford "started smelling . . . alcohol" on Everett's breath.

Rather than engaging in what Ford called a standard traffic stop procedure, she asked Everett if he had any contraband or weapons. Everett responded he had an open beer and a shotgun. (He was a convicted felon.) He denied any other weapons. Ford patted him down and found marijuana.

Ford handcuffed Everett, Mirandized him, and placed him in her squad car. She then searched Everett's vehicle, where she found the .410 shotgun, which was unloaded and wrapped in a black trash bag, on the floorboard of the back seat. She also found the open forty-ounce beer, as well as a set of digital scales with white powder residue, which field-tested positive for crack cocaine. Because Everett had been so cooperative, Ford decided to "cut [him] a break" on the firearm charge and issued him misdemeanor citations for simple possession of marijuana, possession of drug paraphernalia, and driving on a revoked license. She also issued a traffic citation for careless driving. At that point, Ford released Everett from custody.

However, federal charges were brought for Everett's possession of the weapon. He moved for suppression, which the District Court originally granted. After further motions, however, the District Court vacated that order and denied the suppression motion. Everett took a conditional guilty plea and appealed.

ISSUE: May a subject be questioned about unrelated matters during a Terry traffic stop?

HOLDING: Yes

DISCUSSION: Everett did not argue "nor could he - that the traffic stop was invalid at its outset." The Court noted that pretext stops were legal, and his admission to speeding was sufficient to render the stop lawful. Prior 6th Circuit cases had upheld officer's off-topic questions during traffic stops, although other circuits had ruled differently. "This circuit split was resolved in Muehler v. Mena, in which the Supreme Court gave its imprimatur to wide-ranging questioning during a police detention."[104] In Arizona v. Johnson, the "Court removed all doubt that Muehler's reasoning applies to traffic stops." In both cases, the questioning had no effect on the overall duration of the seizure. The Court agreed the questioning in this case may have prolonged the detention for a few minutes, at most. In Johnson, the Court stated "that unrelated questions are permissible "so long as those inquiries do not *measurably* extend the duration of the stop." Circuits that had confronted the issue since Muehler had "refused to adopt a bright-line 'no prolongation' rule." A "police officer intent on asking extraneous questions could easily evade Everett's proposed rule – by delegating the standard traffic-stop routine to a backup officer, leaving himself free to conduct unrelated questioning all the while, or simply by learning to write and ask questions at the same time." The Court declined to construe precedent "as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop." The Court stated that each case must be evaluated on its own, with Sharpe[105] as guidance. Sharpe stated that it was "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . ." The Court found the officer's question about weapons to be completely proper, given that he suspected Everett might be intoxicated. The additional delay caused by the insertion of "extra words" relating to drugs and other illegal items was minimal.

The Court cautioned that "the rule of Muehler and Johnson – i.e., that extraneous questions are a Fourth Amendment nullity in the absence of prolongation – is premised upon the assumption that the motorist's responses are voluntary and not coerced."

The denial of the suppression motion was affirmed.

42 U.S.C. §1983 - PROPERTY SEIZURE

Kennedy v. City of Cincinnati
595 F.3d 327 (6th Cir. 2010)

FACTS: Kennedy possessed a pool token, allowing him to swim in Cincinnati public pools. The token cost $10. Kennedy was accused of staring at children at the pool during a field day and left the area when questioned. Pool staff began to keep a log of Kennedy's actions, which included standing around and watching children. Lifeguards and other staff noted his interactions with children and multiple parents complained of his actions.

On June 21, the pool manager contacted the police and asked that Kennedy be investigated. Officers Smith and Zucker arrived; they were told that Kennedy was violating the pool rules and had been banned by the elementary school for activities that had taken place there. Officer Zucker talked to Kennedy at length and it was determined he was not a sex offender, nor did he have warrants. They concluded that they could take no action against Kennedy.

[104] 544 U.S. 93 (2005).
[105] 470 U.S. 675 (1985).

Hudepohl, the manager, told the officers that Kennedy would be banned and asked them to retrieve his pool token. Kennedy surrendered it and left without incident.

In February, 2008, Kennedy filed a complaint, arguing that Officer Zucker (who actually took the pass), Hudepohl and Cincinnati violated his rights by confiscating the token and restricting his access to the pool without due process. He also argued that Hudepohl had defamed him by "falsely implying that he had engaged in serious sexual misconduct." The defendants requested summary judgment. The District Court dismissed the City, but permitted the action against Zucker and Hudepohl to go forward. Zucker and Hudepohl appealed.

ISSUE: Is "following orders" a valid defense for an officer?

HOLDING: No

DISCUSSION: The Court first concluded that Kennedy did not have a property interest in his pool pass. However, the Court agreed that under Kennedy's version of the facts, he was banned from the entirety of Cincinnati's recreational system, far more than just the single pool. As Hudepohl's case was ruled upon for separate procedural reasons, the Court limited its discussion to Zucker.

> Zucker avers that he should be immune from suit because he was following the orders of Hudepohl, an agent of the municipal pool. However, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order."[106] Regardless of the authority Hudepohl possessed, Zucker was not "relieve[d] . . . of his responsibility to decide for himself whether to violate clearly established constitutional rights[.]" "[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy."[107] Thus, viewing the facts alleged in the light most favorable to Kennedy, we conclude that Zucker violated Kennedy's constitutional rights by banning him from all City recreational property without due process of law.

The Court further ruled that Kennedy had a clearly established right to remain on public property, based upon Williams v. Fears.[108] As such, the Court ruled that Kennedy possessed a constitutionally protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without procedural due process, constituted a violation of a clearly established constitutional right.

Zucker's appeal was denied.

42 U.S.C. §1983 – ARREST

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[106] O'Rourke v. Hayes, 378 F.3d 1201 (11th Cir. 2004) (internal quotations marks and citation No. 09-3089 Kennedy v. City of Cincinnati, et al. omitted).

[107] N.N. ex rel. S.S. v. Madison Metro. Sch. Dist., — F. Supp. 2d —, 2009 WL 4067779 (W.D. Wis. Nov. 24, 2009). See, e.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (officer that was following police chief's order was not immune from suit).

[108] 179 U.S. 270 (1900).

Fettes v. Hendershot
2010 WL 1687727 (6th Cir. 2010)

FACTS: In 2004, an Ohio investigator opened an investigation of a local pizza restaurant for its failure to pay workers' compensation premiums. The owners of the store were listed as "Robert D. Fettes, Jr." and Nancy L. Fettes, but the contact information just showed Robert Fettes. The address was Fettes's home. Bunting, the investigator, went to the home to issue the appropriate warning letter. Fettes, Jr. answered the door, stated that his father (Fettes, Sr.) was the owner and accepted the letter. When the premiums were not paid, Bunting took out a warrant, some seven months later, indicating that Robert Fettes was the defendant. He later stated that he didn't know there were actually two men.

On May 6, 2005, Officer Hendershot (Caldwell OH PD) stopped Fettes, Sr. for running a stop sign. Hendershot ran the license and provided the dispatcher two social security numbers. (Michael Fettes was also in the vehicle.) Warrants came back for both men, with both originating with the Cambridge PD. Starr, the dispatcher, checked with Cambridge and confirmed both warrants, so Hendershot arrested both men. Fettes, Sr. stated he told Hendershot there must be an error. Hendershot himself called Cambridge dispatch, Schick (also a defendant in the case), and provided him with Fettes, Sr.'s SSN. Schick later testified he had little memory of the call, but stated that he thought he verified it and that he wrote an SSN on the back of one of the warrants.

Hendershot turned them over to Cambridge officers. Officer Milburn took charge of Fettes, Sr., and substituted his cuffs for Hendershot's. Sr. immediately complained the cuffs were too tight, but he was driven to the jail, some ten minutes away. When presented with the actual warrant, which had his son, Jr.'s SSN written on it, he told the jailer of the error. Upon request he told the jailer about the tight cuffs, and after searching him, she removed them. Jail Officer Fitch compared the SSNs available and realized the mistake. Fettes was released without about two hours of the initial arrest. He went to the hospital ER and claims to suffer from "handcuff neuropathy," permanent damage to the wrist nerves.

Fettes filed suit under 42 U.S.C. §1983, against all involved. The District Court dismissed some of the counts but allowed others to proceed. Everyone appealed.

ISSUE: Is an arrest warrant presumed valid until proven otherwise?

HOLDING: Yes

DISCUSSION: First, the Court discussed the application of qualified immunity to the various defendants. With respect to the actual arrest, the Court noted that the validity of an arrest warrant depends upon the existence of probable cause.[109] "Arrest warrants in the hands of a police officer, unless facially invalid, are presumed valid." If the officer "reasonably mistake[s] a second person as being the individual named in the warrant and arrest[s] him, the arrest of the second person does not offend the Constitution."[110]

Further:

[109] Baker v. McCollan, 443 U.S. 137 (1979).
[110] Hill v. California, 401 U.S. 797 (1971).

> In Masters v. Crouch, this court held that "police and correction employees may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistake identity or otherwise.[111]

The Court agreed that although it might be arguable "that Schick was negligent in failing to verify Fettes's address, as that information was readily verifiable, … negligence does not equate to a constitutional violation."

With respect to the handcuffing, the Court noted that "unduly tight on excessively forceful handcuffing" is prohibited, but that "not all allegations of tight handcuffing" rise to the level of excessive force.[112] The Court agreed that its 'precedents fail to notify officers that any response to a complaint of tight handcuffing other than an immediate one constitutes excessive force. Given the short duration of the trip, the officer's "adherence to police handcuff protocol, and absence of any egregious, abusive, or malicious conduct supports the reasonableness of the officers' conduct. The officers actions were found to be in the 'hazy border between excessive and acceptable force" and thus the officers should have been granted qualified immunity.

The Court reversed the decision against the two Cambridge officers and Schick.

42 U.S.C. §1983 – USE OF FORCE

Miller v. Village of Pinckney
2010 WL 547072 (6th Cir. 2010)

FACTS: On November 8, 2006, after a night of drinking, Darlene Miller decided to visit her ex-husband, hoping to visit her children. When her ex-husband discovered she was there, she was ordered to leave. When Miller threatened to kill herself, he called 911 - she then left. Officer Garbacik (Pinckney PD) was dispatched, with Officer Shepard as back up. They were given a description of Miller's vehicle.

Shepard arrived first and spotted the described van. He attempted to stop it but Miller sped up. Garbacik elected to follow it; Shepard stayed where he was in case that wasn't the correct vehicle. Garbacik stopped the van. Miller, realizing from the plate that it belonged to Miller, set off in search of Garbacik. Radio difficulties complicated matters and Shepard became more concerned since his partner had called for assistance by hitting her emergency button. He was able to figure out where she was and proceeded to assist. Garbacik, in the meantime, was trying to control Miller, who threw two bottles of Mike's Hard Limeade out the window toward Garbacik. When Shepard arrived, he saw the two standing close to each other, but he did not realize that Garbacik had already managed to get handcuffs on Miller. A video of the scene showed Shepard dashing toward the pair, raising his arm and striking Miller in the face and throat with his forearm. "He forcefully moved Miller to the van and pushed her body up against it." Shepard claimed that on the way to the van, Sheppard "kneed her to the ground," but the video contradicted this account. She was placed in Garbacik's cruiser.

[111] 872 F.2d 1248 (6th Cir. 1989)
[112] Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394 (6th Cir. 2009)

Eventually Miller pleaded no contest to two counts of resisting and obstructing an officer. She then sued Shepard and the Village of Pinckney, alleged excessive force. The District Court gave summary judgment and dismissed the case against Shepard and the village. Miller appealed.

ISSUE: Is a use of force unjustified when only determined to be so after the fact?

HOLDING: No

DISCUSSION: The Sixth Circuit looked to the trial court's opinion, agreeing that while objectively, the force Shepard used was greater than was necessary, that he had only "a few seconds at best" to decide upon a course of action, and "in light of the circumstances, his use of force was not unreasonable." It added only two points. First, he noted that her conviction did not bar her claim, since it would not have invalidated her underlying conviction.[113] At least theoretically, she could both admit to resisting arrest and still successfully claim that Shepard had used excessive force against her. Second, her best possible claim, Shepard's initial strike, does not state a constitutional claim, given what Shepard knew and saw at the moment he took that action. This was affirmed by the lack of any "objectively serious injuries from the impact." The Court agreed that Shepard could have taken other actions, but noted that an "officer's use of force does not become constitutionally unreasonable just because, after the dust has settled, we can imagine a more reasonable way for responding to an officer in need."[114]

The summary judgment and dismissal were affirmed.

Schreiber v. Moe and City of Grand Rapids
596 F.3d 323 (6th Cir. 2010)

FACTS: On November 1, 2002, Officer Moe (Grand Rapids, MI, PD) was patrolling. At 3:45 a.m., he was dispatched to Schreiber's apartment on a priority level that indicated there was some risk of harm to someone at that location. Specifically, there was a belief by the caller that Schreiber's teenage daughter, Sarah, was "getting beat."[115] When Officer Moe arrived, he "could hear an angry male voice yelling profanities." Schreiber later agreed he was in a "heated discussion" with his daughter. Moe knocked; a 10-year-old boy answered. Officer Moe could see Schreiber "yelling at someone within the house" – although there was dispute as to whether Sarah was visible. Schreiber came to the door and profanely asked why Moe was there. Although there was dispute as to the actual conversation, Schreiber agreed he asked for a warrant and "explicitly told Moe that Sarah was fine." Moe however, entered, and later claimed that Schreiber's wife, Emily, "invited him to come in further."

Moe saw Sarah, who was crying and upset, but apparently uninjured. The house, however, was in "chaos." Schreiber and Sarah continued yelling, and Schreiber began "shouting various insults at Moe" – using such terms as "neo-Nazi" and pig. He also did not deny stating he would have the "Michigan Militia" kill Moe. Moe called for backup.

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[113] Heck v. Humphrey, 512 U.S. 477 (1994)
[114] Illinois v. Lafayette, 462 U.S. 640 (1983); Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000)
[115] Although the record reflected that there was additional information available to dispatch, because there was no indication that information was shared with Officer Moe, the Court found it irrelevant to this discussion.

At some point, Emily gave Moe a telephone and explained a local social worker was on the phone – who proposed that Sarah come to the youth shelter to get away from her father temporarily. Officer Velman arrived, and Moe began to check the computer for anything on Schreiber. Schreiber became even more agitated and asked to go to his room. Moe however, refused, fearing he might be going to get a gun. He was also denied when he asked to go to the bathroom. (He later alleged that he has a bowel condition that caused an urgent need to go to the bathroom, but there was little indication that Officer Moe was aware of this.) Schreiber eventually ran to a balcony and tried to find a way down – some ten feet. The balcony door became locked, although there was dispute as to how it became so. Schreiber used a chair to break the door and re-enter the apartment. At that point, Schreiber, who claimed to be calm and in control, alleged Officer Moe threw him to the ground, punched him multiple times and squeezed his groin. (He agreed he was calling Moe names throughout the incident, as well.) Moe claimed that Schreiber attacked him and that he defended himself. Officer Veldman was busy trying to keep other family members out of the fray.

Schreiber was arrested and removed to Moe's patrol car. He was eventually taken to the hospital and found to have head lacerations and a swollen eye. He pled no contest to an assault on a police officer. He then filed suit against Moe (and the City) under 42 U.S.C. §1983, claiming false arrest, illegal imprisonment, entering without a warrant, unlawful seizure and excessive force. Moe and the City requested summary judgment, which was granted in part by the trial court. Moe's entry was justified under exigent circumstances, and Heck v. Humphrey[116] "barred Schreiber's false-arrest and illegal-imprisonment claims" because he pled guilty to underlying offenses. The trial court divided the force claim into two segments, that force used during the actual arrest and the force allegedly used against Schreiber once he was in the patrol car. The Court agreed Heck disallowed the claims that took place pre-custody, but allowed the claim concerning force in the police car to continue. The City, itself, was dismissed.

Schreiber, however, failed to move forward on his one remaining claim and the Court dismissed that claim as well. However, he was able to get the claim reinstated upon appeal. Schreiber then agreed to dismiss that claim, but reserved the right to appeal the previous dismissal of the other claims. That appeal followed.

ISSUE: Does a conviction or guilty plea to an underlying charge invalidate a use of force claim?

HOLDING: No (but see discussion)

DISCUSSION: The Court reviewed each of the claims. First, with respect to the warrantless entry, the Court agreed that "exigency exists 'where there are real immediate and serious consequences that would certainly occur were a police officer to postpone action to get a warrant.'"[117] In Michigan v. Fisher, the Court agreed, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[118] The Court quickly agreed that the risk of harm to Sarah was an exigent circumstance, given what Officer Moe was told by dispatch. However, since it was, in effect, an anonymous call, the Court had to evaluate whether that was enough. But, the court concluded he had to evaluate whether "any evidence [was] observed by the police in the course of

[116] 512 U.S. 477 (1994).
[117] Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002).
[118] 130 S.Ct. 546 (2009)

investigating the call" that corroborated the tip.[119] The Court agreed that Officer Moe "made several observations that corroborated the 911 caller's conclusion that Sarah was at risk of physical danger." Both versions of the facts provided would have justified Moe's entry to ensure that Sarah was safe, even though the Court agreed there "were no signs of blood." (The Court noted that there was no need to show a likelihood of a "serious, life-threatening injury to invoke the emergency aid exception."[120]

With respect to Moe remaining in the apartment after he assured himself that Sarah was uninjured, the Court noted that the "situation continued to deteriorate." As such, Moe could have reasonably believed that "Schreiber was on the brink of violence and that, even if Moe had determined that Sarah was at that point unharmed, a continued police presence was required for a time to prevent further harm."

Moving on to the force used after Schreiber "shattered the balcony door and re-entered the apartment," the Court noted that the versions of the facts differed dramatically. At this state of the proceeding, the Court is required to construe all disputed facts in favor of the plaintiff. Had Moe used force in the face of a compliant subject, as Schreiber claimed to have been, it would have been legally excessive. His claims also extended to force he claimed was used after he was handcuffed, as well. As such, Officer Moe could not be awarded dismissal under qualified immunity at this stage – as the right to be clearly free from being "punched in the face twenty times as he lay on the floor," as Schreiber claimed, was sufficiently established.

The Court continued, however, acknowledging that "Schreiber's deposition testimony is at times inconsistent both with itself and with his prior statements." But at this stage, such analysis was not permitted. The Court further did not find that Heck barred this part of the action, because any force against him was immaterial to his underlying conviction. (A decision in favor of Schreiber would not invalidate the arrest.)

The Court affirmed the dismissal in the issue of the entry and reversed the dismissal with respect to the excessive force claims. That claim was permitted to move forward.

Karttunen v. Clark
2010 WL 935613 (6th Cir. 2010)

FACTS: Clark, a Michigan state trooper, was dispatched to Karttunen's home on November 10, 2004, to investigate a hit and run accident. He also knew that Karttunen had an outstanding arrest warrant. He knocked and got no response. He looked in a window and saw Karttunen asleep. Clark was able to awaken him by knocking on the window; Karttunen came to the window. Clark asked him to come outside to get a message but Karttunen refused. Clark told him he would impound his truck if he didn't come outside. Clark grabbed Kartthunen when he opened the door and allegedly tackled him and took him to the ground, injuring him. Clark put him into a patrol car. Clark described it as a controlled takedown. He did agree he had not told Karttunen he was under arrest until he was handcuffed. Karttunen eventually pled no contest to a resisting arrest charge. He then filed suit under 42 U.S.C. §1983, alleging excessive force. Clark requested summary judgment, which was denied, with the trial court finding that the no contest plea did not bar the action and that Karttunen's version of the fact showed no indication at all of resisting

[119] Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003)
[120] Fisher, supra.

and therefore, no force at all was justified. Just prior to trial, Clark raised a defense under Heck v. Humphrey. The District Court ruled in Clark's favor and dismissed the case. Karttunen appealed.

ISSUE: Does a conviction or guilty plea to an underlying charge invalidate a use of force claim?

HOLDING: No

DISCUSSION: The Court noted that the "salient question is whether the 1983 claim 'necessarily' implies the invalidity of the state-court conviction."[121] The Court looked to its decision in Schreiber v. Moe, and stated that "the mere fact that the conviction and the 1983 claim arise from the same set of facts is irrelevant if the two are consistent with one another." Since Michigan law did not provide for an affirmative defense of excessive force in a resisting arrest case, the court found that excessive force could still have occurred in the context of Karttunen's arrest.

The judgment in Clark's favor was reversed.

Jefferson v. Lewis
594 F.3d 454 (6th Cir. 2010)

FACTS: On December 31, 2006, Officer Lewis (Flint, MI, PD) responded to a shots fired call. At 10:30 p.m., when the call came, he'd been on duty about 11 hours due to a shortage of officers. At the scene, witnesses reported that the shots had been fired, and that bullets had struck near them. He heard six shots from a "long gun" of heavy caliber. He called for backup and went to the location, but several more gunshots appeared to be more faint. He got out of his car, with shotgun, and proceeded on foot. He heard more shots and took cover behind a parked car. He heard male voices and moved to determine their location, and spotted two men, one of whom had a long gun.

He told the men to freeze, drop the gun and put their hands up. Adams and Manning, the two men, testified that they complied, but Lewis contended Manning ducked behind a column and "Adams continued reaching into the trunk of [a] car." Both men eventually complied. A third man, Stewart, emerged and he was also ordered to freeze. Officer Lewis testified, however, that the "men continued to duck up and down and to move their hands toward their waists." He only saw Manning with a gun, however.

Officer Lewis heard another "loud metal sounding" noise to his left and saw another individual coming from the house. He saw it was an unarmed woman and told her to go back into the house. He spotted more movement from the side door of the house. A person was "standing in the doorframe." "He perceived a hand with something metallic in it extended in his direction beyond the door frame and, at the same time, a flash of light." He thought the person was firing at him, and he returned fire with the shotgun. However, he did not chamber another round into his shotgun after firing the first shot and did not take cover to protect himself from future gunfire." It turned out to be Jefferson, who testified that she did not have a weapon or anything shiny in her hand, except possibly the doorknob. She was injured by the shots, although the opinion did not detail the extent of her injuries.

Jefferson sued for excessive force under 42 U.S.C. §1983. Officer Lewis requested summary judgment, which the District Court denied. Officer Lewis appealed.

[121] Swiecicki v. Delgado, 463 F.3d 489 (6th Cir. 2006).

ISSUE: Are unarmed and nondangerous subjects subject ot deadly force?

HOLDING: No (but see discussion)

DISCUSSION: First, the Court ruled that it was proper to entertain the interlocutory appeal, since Lewis was willing to concede Jefferson's version of the facts for the purposes of the appeal.

The Court started with a quote from Graham v. Connor - "All claims that law enforcement officers have used excessive force—deadly or not . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[122]

Further:

> We apply "the objective reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Further, we conduct the reasonableness inquiry objectively, based on the "information possessed" by the officer, without regard to the officer's subjective beliefs and without regard to facts not known by the officer at the time of the incident.[123] In an excessive force claim involving an officer's use of deadly force, the Supreme Court has instructed that the test is whether the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[124]

With respect to the first inquiry under Saucier v. Katz, the Court agreed that Jefferson's version of the facts showed a clear indication that her constitutional rights were violated. The Court noted that "[o]nly in rare instances may an officer seize a suspect by use of deadly force."[125] However, while it is true that "[a]s a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers," whether a suspect is "nondangerous" is based on the facts known to the officer at the time of the incident, not on hindsight. The Court concluded that "whether Officer Lewis had probable cause to believe that he was in danger of serious harm turns, in large part, on the resolution of [the] factual dispute": as to the mysterious flash he observed. Since Jefferson had a right to be free of unlawful seizure, it must be left to a jury to decide whether her Fourth Amendment rights were violated.

The second prong of the Katz inquiry:

> … is whether the right was clearly established and whether Officer Lewis's actions were objectively unreasonable in light of that clearly established right. In other words, in light of the undisputed facts and viewing any factual disputes in the light most favorable to

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[122] 490 U.S. 386 (1989).
[123] Dunn v. Matatall, 549 F.3d 348 (6th Cir.2008) (citing Graham).
[124] Tennessee v. Garner, 471 U.S. 1 (1985).
[125] Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005) (quoting Whitlow v. City of Louisville, 39 F. App'x 297 (6th Cir. 2002)).

> Jefferson, was Officer Lewis's decision to fire at the individual standing in the doorway objectively unreasonable in light of a clearly established right to be free from deadly force? In this case, this turns on whether (a) Officer Lewis actually did see a flash in the doorway that he believed to be a muzzle flash from a gun and, (b) if so, whether that belief and his response were reasonable. If the answer to those two questions is an unequivocal "yes" even under Jefferson's version of events, then Officer Lewis is entitled to qualified immunity regardless of whether there was a constitutional violation. However, absent an unequivocal affirmative, the question of qualified immunity must be submitted to the jury.

Further:

> The second question is whether (1) Officer Lewis's belief that the flash of light was a muzzle flash coming from the individual in the doorway shooting at him and (2) his reaction to that stimulus were objectively reasonable. The fact that most strongly cuts against the reasonableness of Officer Lewis's decision to "return" fire is that, even accepting Officer Lewis's testimony on its face, Officer Lewis only saw a flash; he heard no corresponding gunshot before he "returned" fire. Additionally, Officer Lewis did not chamber another round in his shotgun or seek cover, which one might expect an officer to do if he reasonably believed that he was being fired upon. But, on the other hand, it is uncontested that Officer Lewis immediately began checking his bullet-proof vest to see if he had been shot, a fact which certainly cuts strongly in Officer Lewis's direction.
>
> In light of the competing inferences one might draw from these facts and their effect on the question of whether Officer Lewis's actions were objectively unreasonable, we agree with the district court that the jury should find the facts that determine whether Officer Lewis is entitled to qualified immunity.

The Court concluded that it was not improper to deny Officer Lewis qualified immunity at this stage and affirmed the decision.

Wilson v. Wilkins
362 Fed.Appx. 440 (6th Cir. 2010)

FACTS: On December 24, 2006, Wilson called Nashville (TN) PD concerning a domestic dispute with her husband, but they did not intervene. On December 28, she called again, alleging assault. Officers Wade and Smith responded. Wilson told them she wanted her husband to leave to give her "space." Officer Wilkins arrived and urged Wilson to have her husband arrested. Under pressure, she finally agreed.

Officer Smith told Wilson her husband would have to appear in court downtown, and Officer Wilkins insisted she ride with him. She agreed and rode in the front seat. On the way downtown, and after Wilkins passed the usual routes to downtown, Wilson became concerned. Officer Wilkins caressed her hand, which Wilson considered offensive under the circumstances. When the vehicle slowed, Wilson unhooked her seatbelt and jumped from the car, screaming for help from passers-by. Wilkins called for backup and specifically asked for a female officer. Wilson told the officer who responded, Officer Booker, who she actually knew, that she thought Officer Wilkins was trying to rape her.

Wilson filed suited under 42 U.S.C. §1983, claiming injury to a vocal cord that required surgery. Wilkins moved for summary judgment, arguing that she wasn't seized, and further that there was no clearly established constitutional right that he had violated. The District Court denied the motion, finding that she was captive in a moving vehicle. Wilkins and the City appealed.

ISSUE: Might an attempted restraint by an officer (for a presumed sexual assault) be considered a "show of authority" for 1983 purposes?

HOLDING: Yes

DISCUSSION: The Court agreed that the claims had to be analyzed under the Fourth Amendment, and further, that Wilkins's action constituted a "show of authority." The Court also agreed that physical touching could constitute a seizure. The Court agreed that Wilson's right not to have her liberty impinged by a state actor exercising authority over her was clearly established at the time of the incident. Finally, the Court ruled that what Wilkins did was objectively unreasonable. The denial of summary judgment was affirmed.

STATE-CREATED DANGER

Willis v. Charter Township of Emmett
360 Fed.Appx. 596 (6th Cir. 2010)

FACTS: At about 6:30 a.m., on July 18, 2003, Willis was involved in a terrible crash with another vehicle. Willis's pickup had the cab partially ripped from the frame - it landed upside down. A bystander who stopped to help tried to take Willis's pulse, his arm was dangling through the window, but found nothing. However, he did crawl partways inside and found Willis to be breathing. Bishop, a local police officer/firefighter who responded, was told that Willis had no pulse. (Reed claims he told Bishop that Willis was breathing, but Bishop denied that.) Bishop focused on the other victims and told yet another officer, Barbre, that Willis was dead. Barbre radioed that information to other responders. "When paramedics arrived, Barbre specifically instructed them not to go to [Willis's] pickup because the driver was dead and instead told them to treat the other victims." Counts, a local firefighter, also tried to get a pulse with no success. He did note that Willis's "lower body was badly mangled." He denied telling the paramedics that Willis was dead and noting that he was never told that Willis was breathing.

Willis was pronounced dead by an ER physician, who did so via phone. Willis was left in the truck, which was covered by a sheet, for several hours while the wreck was being investigated. At about 8:45 a.m., the sheet was removed and the cab secured so that firefighters could extricate the body - but "someone from the medical examiner's office who was able to enter the cab discovered that [Willis] was still breathing.' He was immediately taken by helicopter to the hospital, but died before 10 a.m.

His estate filed sued against all responders, under 42 U.S.C. §1983. The federal claims were dismissed under summary judgment and the estate appealed. (The negligence claims were remanded to the state court.)

ISSUE: Is a failure to take action always actionable?

HOLDING: No (unless there is a specific duty to do so)

DISCUSSION: The initial question is whether Bishop and Counts (the firefighter) violated Willis's rights under the 14th Amendment by failing to provide Willis "with medical care and spreading the false information that he was dead, causing the other emergency responders not to treat him." Normally, there is no affirmative duty on the state to protect or aid individuals.[126] There are two exceptions to this rule: "the 'custody' or 'special relationship' exception" and the "state-created danger exception."[127] The Court first looked to the "custody" exception and determined that it did not apply because no affirmative action by a state actor restrained Willis from acting in his own behalf. He was, instead, "restrained by the unfortunate circumstances of the car accident." There was no indication Bishop and Counts knew of Willis's situation, they "erroneously assumed he was dead."

With respect to the state-created danger exception, the Court looked to the three factors that might apply: "if the state actor affirmatively acted to create or increase the risk of injury," "if the victim, or a small class including the victim, was especially endangered" and "if the state actor had the requisite degree of culpability."[128] The Court agreed that the two men did not "affirmatively act" to deny Willis care, but noted the "difficulty of distinguishing between an affirmative act and a failure to act." However, it agreed that they did not make Willis somehow less safe, nor did they expose him to other private acts of violence. Certainly his condition likely deteriorated while he was left untreated, but that did not impute liability to Bishop and Counts. Even under the lesser standard of deliberate indifference, neither had sufficient culpability, nor was his situation so obvious to responders. In hindsight, they should have more thoroughly evaluated Willis, but they did not "act with deliberate indifference in failing to do so." In addition, they had other duties at the scene that drew their attention.

The Court also looked at the allegation that their actions somehow "arbitrarily thwarted potential attempts by private parties to rescue" Willis.[129] However, they put forth no evidence that any other private individual did attempt to assist him, since everyone assumed he was deceased.

The grant of summary judgment was affirmed.

EVIDENCE / TRIAL PROCEDURE

Akins v. Warren
362 Fed.Appx. 508 (6th Cir. 2010)

FACTS: Akins was charged with the shooting of Davis, on February 19, 2001, during a robbery attempt. He admitted he was a lookout, but stated that another individual did the actual shooting. (The individual, however, took a plea and pointed the Akins as the shooter.) Akins was convicted of felony murder and appealed.

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[126] DeShaney v. Winnegago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
[127] Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
[128] Hunt v. Sycamore Cmt. Sch.Dist. Bd. of Educ., 542 F.3d 529 (6th Cir. 2008); McQueen v. Beecher Cmty. Sch., 433 F.3d 460 (6th Cir. 2006); Ewolski V. City of Brunswick, 287 F.3d 492 (6th Cir. 2002).
[129] Beck v. Haik, 234 F.3d 1267 (6th Cir. 2000).

ISSUE: Does an officer using a co-defendant's statement as evidence of a crime invoke the right to confront witnesses?

HOLDING: No

DISCUSSION: At trial, the prosecutor asked one of the investigating officers if he "had evidence, independent of Cuesta's testimony, that Akins was the shooter." (Cuesta was the individual Akins accused of the shooting.) The officer agreed but did not provide "further explanation or detail." (It was later agreed that evidence was a statement from Akins's co-defendant, Mitchell, who stood trial with him. Akins argued that the testimony violated his Sixth Amendment right to confront the witness, but the Michigan court found that the officer's evidence was not testimonial.

The Court agreed that the admission of a defendant which implicates his or her co-defendants "cannot be introduced at a joint trial unless the confessing defendant takes the stand."[130] It specifically includes statements taken by police during an interrogation. The Court found that no Bruton or Crawford[131] violation occurred, however, the question should not have been asked by the officer.

However, the Court also addressed the prosecutor's misconduct in asking the question in the first place, because the evidence itself was inadmissible, and in mentioning it again in closing. The Court found the error to be minimal, as it was cured by an appropriate instruction from the judge at the time.

U.S. v. Morrison
594 F.3d 543 (6th Cir. 2010)

FACTS: On November 28, 2006, Officers Strickland and Merritt (Memphis, TN, PD) saw a vehicle roll through a stop sign and suspected the driver was impaired. They followed it and made a traffic stop. Strickland approached Morrison in the driver's seat, while Merritt approached on the passenger side. They noticed the strong smell of marijuana. Strickland had Morrison get out for a field sobriety test. As Morrison got out, Strickland noticed a pistol grip sticking out between the seat and the console - a .32 caliber loaded Colt. The weapon was located "less than inches" from Morrison and probably touching his side as he sat in the vehicle. Since Morrison was a convicted felon, he was charged and ultimately convicted. He then appealed.

ISSUE: Is proximity to a gun sufficient proof to charge a felon with possession, even without evidence as to the ownership of the vehicle?

HOLDING: Yes

DISCUSSION: The Court noted that the prosecution's proof was sparse, as there was no evidence on the record as to who owned the vehicle or who the passenger was. There were no fingerprints on the gun and no proof that Morrison owned it, "although in these cases there almost never is." However, the Court found that the proof was adequate, given the gun's actual location in the vehicle. The Court agreed it was functionally equivalent to a holster and more than just a case of "mere proximity," since Morrison had to know the gun was there.

[130] Bruton v. U.S. 391 U.S. 123 (1968).
[131] Supra.

The conviction was affirmed.

Warlick v. Romanowski (Warden)
2010 WL 729528 (6th Cir. 2010)

FACTS: Warlick was charged with the murder of Fortune, in a Detroit nightclub, after being found hiding near the scene in close proximity to the murder weapon. The next morning, after an hour of interrogation, Warlick agreed to provide a signed statement, to the effect that another man, Spoon, actually shot Fortune during the course of a robbery. He stated he did not know what Spoon did with the gun or the identity of the other person.

Warlick was charged with "felony murder" - as he admitted to being involved with the commission of a felony that resulted in the murder, even if he didn't shoot Fortune himself.[132] He moved for suppression of the statement, but was denied. At trial, gunshot residue tests taken during the same interrogation were also admitted, and an expert stated that Warlick either fired a gun or was in close proximity to one when fired. A defense witness (an officer) testified that he examined a vehicle and that that witnesses had testified to someone fleeing the seen in a similar vehicle.

Warlick was convicted and appealed.

ISSUE: Must a defendant claiming a Brady violation indicate which evidence was potentially exculpatory and how?

HOLDING: Yes

DISCUSSION: Warlick argued that his statements were coerced. "To make this determination, this court must look at the totality of the circumstances to ascertain whether Warlick made an uncoerced choice and whether he possessed the required level of comprehension."[133] "Factors to consider in this analysis include "the age, education and intelligence of the suspect; whether the suspect was advised of his Miranda rights; the length of the questioning; and the use of physical punishment or the deprivation of food, sleep or other creature comforts."[134] The Court looked at the circumstances of the statements and the officers' testimony that he was "promised that the police would mention his help to the prosecutor if he cooperated." One of the officers testified that "no threats, coercion or promises were made" otherwise. Warlick was given his rights and his demeanor and education level indicated that he could understand those rights. The Court agreed the statement was admissible.

Warlick argued that the state suppressed evidence in violation of Brady v. Maryland.[135] To be successful, "Warlick must demonstrate that (1) the evidence in question is favorable, (2) the State suppressed the relevant evidence, and (3) the State's actions resulted in prejudice."[136] Warlick contended that a "delay in

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[132] Felony murder is the common term used to charge an individual who did not actually kill a victim, but who acted on concert with someone who did. For example, if a bank employee is murdered during the course of a bank robbery, all of the robbers may be charged with felony murder for their death.
[133] Moran v. Burbine, 475 U.S. 412 (1986) (quoting Fare v. Michael C., 442 U.S. 707 (1979)).
[134] Jackson v. McKee, 525 F.3d 430 (6th Cir. 2008) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).
[135] 373 U.S. 83 (1963).
[136] Strickler v. Greene, 527 U.S. 263 (1999).

turning over material encompassed by a discovery order" affected his ability to mount a defense - but he did not explain which pieces of evidence caused the problem or that that evidence was exculpatory. He also failed to note how the proceedings might have been different had the evidence been disclosed.

He also argued that the late inclusion of a witness (a lab technician) on a witness list was prejudicial, since he was permitted to testify. The Court agreed that it was alright, however, because "Warlick should have reasonably anticipated that someone would present testimony about administering the gunshot residue test." He also had ample opportunity to cross-examine the witness.

Finally, he also claimed that it was inappropriate to admit the 911 call to the police by a witness. The witness testified, and authenticated the tape as a recording of her call. In addition, the contents were not a factor in the conviction.

Warlick's conviction was affirmed.

INTERROGATION - RIGHT TO COUNSEL

Tolliver v. Sheets
2010 WL 2710953 (6th Cir. 2010)

ISSUE: On December 29, 2001, at about 1 a.m., Schneider was shot in her Columbus (OH) apartment. She shared her home with her boyfriend, Tolliver. Tolliver called a number of people, including his ex-wife, who eventually made the call to 911. Police responded and found Tolliver covered in blood, although he had washed his hands. While sitting in one of the cruisers outside, Tolliver made several unprompted comments. He was taken to the station and gave an interview, and "made a number of statements that the prosecution later used at trial to cast doubt on his credibility." In addition, the deputy coroner found a number of bruises and abrasions on Schneider's body. (Her manner of death was listed as undetermined.) Tolliver was ultimately convicted of murder and appealed.

ISSUE: Must law enforcement cease questioning after a suspect invokes the right to counsel?

HOLDING: Yes

DISCUSSION: Tolliver first argued that his statements to the police were inadmissible. The trial court had found them mostly admissible, with the one statement that was inadmissible harmless. The Court found that "while many of Tolliver's statements were voluntary, the police eventually began interrogating Tolliver within the meaning of Miranda, and continued the interview and interrogation even after Tolliver invoked his right to counsel."

> In this case, the government concedes both that Tolliver was in custody and that the police did not successfully administer a Miranda warning. The questions for us, then, are whether: (1) the police interrogated Tolliver; (2) Tolliver ever invoked his right to remain silent; or (3) Tolliver ever invoked his right to counsel. While Tolliver interrupted police attempts to administer the Miranda warning, volunteered numerous statements, and was unclear as to whether he was invoking his right to remain silent, we find that at times the police crossed the line into "express questioning or its functional equivalent" and that, prior

> to the end of the interview, Tolliver unambiguously invoked his right to counsel. In other words, the statements police obtained from Tolliver following the initiation of interrogation and Tolliver's invocation of the right to counsel were obtained in violation of Tolliver's Fifth Amendment rights; the trial court thus erred in admitting those statements at trial.

The Court also agreed that suspects have a right to remain silent, but that "even if a suspect has invoked his right to remain silent, any information he then *volunteers* is admissible, provided it did not result from further interrogation." The Court stated Tolliver "cannot have it both ways: if he wanted to invoke his *right* to remain silent, he then needed to *remain* silent."

Further.

> Tolliver's third statement, that he was not going to exercise his right to remain silent until he was informed that he had that right, simply cannot stand as an invocation of the right to remain silent. To the contrary, Tolliver was clearly stating that he had *not* invoked his right to remain silent, but that he *would*. Tolliver apparently believed that he could volunteer information to the police while retaining his right to remain silent, because he had prevented Viduya from administering the Miranda warning. Tolliver was, of course, incorrect. Moreover, we share the state trial court's "definite impression" that Tolliver wanted "to assert his position and argue his perception of evidence to the detective, without being questioned."

Finally:

> The line between impermissible interrogation and permissible follow-up questions to volunteered statements is a fine one. Police may listen to volunteered statements, and need not interrupt a suspect who is volunteering information in order to deliver a Miranda warning. Police may even interrupt a volunteered statement to ask clarifying or follow-up questions.[137]
>
> That said, when asking a suspect about volunteered information, police may at times cross the line from asking clarifying or follow-up questions into the "express questioning or its functional equivalent,"[138] The Supreme Court, while not explicitly clarifying the distinction between permissible follow-up questions and impermissible interrogation, has stated in a different context that, even at meetings with the police initiated by a suspect, "[i]f, as frequently would occur . . . the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.'"[139] Again, as the Supreme Court has made clear repeatedly, "[w]ithout obtaining a waiver of the suspect's Miranda rights, the police may not ask questions . . . that are designed to elicit incriminatory

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[137] See U.S. v. Rommy, 506 F.3d 108 (2d Cir. 2007) (collecting cases); Andersen v. Thieret, 903 F.2d 526 (7th Cir. 1990) (rejecting custodial interrogation challenge when, in response to suspect's volunteered statement, "I stabbed her," police asked, "Who?").

[138] Innis, 446 U.S. at 300-01, barred by Miranda. See, e.g., U.S. v. Crowder, 62 F.3d 782 (6th Cir. 1995) (holding that police officer interrogated suspect when, after suspect stated that shotgun was "in the wood," officer asked clarifying question about location).

[139] Edwards v. Arizona, 451 U.S. 477 (1981) (addressing whether police questioning of a suspect constitutes interrogation where the suspect first invoked his Fifth Amendment right to counsel but then arranged a meeting with investigators and volunteered information).

admissions."[140] The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police are seeking to expand the interview.

The Court agreed that the trial court was correct in considering Viduya's statement a "follow-up question and thus did not constitute interrogation."

The Court did find improper Viduya's question about the wound. When they began discussing how Tolliver could obtain an attorney without money, the Court found that all statements from that point on were in violation of the Fifth Amendment. The Court concluded that "any reasonable police officer would have immediately understood that Tolliver was asking to see an attorney" and that his request was "an unambiguous invocation of his Fifth Amendment right to counsel."

However, the Court summarized: "[i]f all of the statements the prosecution used at trial to argue that Tolliver had lied when speaking to the police had been improperly admitted, this would be a closer case. In fact, however, many of the statements were properly admitted. The prosecution's infrequent references to Tolliver's improperly-admitted statements thus "were, in effect, cumulative." The Court found the admission of the statements to be harmless and affirmed the denial of Tolliver's petition.

EMPLOYMENT

Kindle, Silveria and Adkins v. City of Jeffersontown
2010 WL 891305 (6th Cir. 2010)

FACTS: Kindle, Silveria and Adkins (nka Handy) worked for the Jeffersontown PD. They were fired in 2007 following their making of allegations of misconduct by Lt. Col. Emington - they had circulated the report to the Mayor, and other city officials as part of a letter to the city's ethics commission. They had previously informed the police chief that Emington had created a hostile work environment that had forced them into medical leave, but the chief denied that he could do anything about Emington's actions. While Silveria and Adkins were off, other officers also reported misconduct to the Chief, who told Foreman (the mayor) about the problem. A short time later, they reported the problem directly to Foreman and told him they were considering filing for protection under the Kentucky Whistleblower Act (KWA). Foreman asked the to hold off until after the election, a month away. The three, however, tendered the report under KRS 61.102 on October 27 - specifically alleging that Emington:

> (1) violated federal and state wage and hour laws by requiring dispatchers to report for duty fifteen minutes early and not paying them overtime; (2) generated unnecessary overtime by forcing some dispatchers to work overtime so that others could attend social events with Emington; (3) violated staffing policy by leaving only one dispatcher on duty so that others could accompany Emington on Secretary's Day; (4) failed to contribute to the retirement account of a part-time employee and then reduced that employee's work schedule when she complained to the administration; (5) improperly used an online database to check on employees' controlled substance prescriptions; (6) failed to qualify with her firearm; and (7) committed miscellaneous acts of mismanagement and/or abuse of authority.

[140] Pennsylvania v. Muniz, 496 U.S. 582 (1990)

The Chief reported to the mayor that he was obligated to investigate the allegations, but the Mayor noted that the matter had been referred to the ethics commission. On Nov. 20, they withdrew the complaint, citing retaliation, and did not appear at the ethics hearing. The complaint was dismissed with prejudice. On Nov. 28, Emington filed a complaint against the three and a hearing was ultimately scheduled. The three appeared by counsel and stated that they would be filing legal action, and as such would present no case before the council. All three were fired.

The three filed an action in state court, which was ultimately removed to federal court. The District Court dismissed the action. The three appealed.

ISSUE: Are statements made about a law enforcement commander's misconduct of "public concern" for purposes of the First Amendment?

HOLDING: Yes

DISCUSSION: First, the Court addressed the argument whether Jeffersontown, a municipality, is a political subdivision under the KWA. "This Court acknowledges that Kentucky courts have recognized a distinction between municipalities and counties and agencies of the state for purposes of sovereign immunity." However, "whether an entity receives sovereign immunity in Kentucky does not appear to be dispositive of whether that entity is a political subdivision for purposes of the Kentucky Whistleblower Act." "Because Plaintiffs engaged in precisely the type of behavior that the Whistleblower Act is designed to protect, and the Kentucky Supreme Court indicated in Allen[141] that the statute is enforceable against municipal corporations, Plaintiffs may proceed with their claim under the Kentucky Whistleblower Act against the City of Jeffersontown."

With respect to First Amendment claims, the Court noted that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[142] A three step inquiry assists in that determination. First the Court "must determine whether the relevant speech addressed a matter of public concern." If yes, the next step is balancing "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." And finally, the Court must decide if "the employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee."[143]

On the first element, the Court agreed that the allegations against Emington were matters of public concern.[144] The information provided by the three was bolstered by information provided by other employees, as well. The District Court did not address the second element, so the Court elected to remand the matter back to that court for further findings necessary to decide if the speech was protected. Jeffersontown bears the burden "of proving that they had legitimate efficiency interests that outweigh

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[141] Consolidated Infrastructure Mgmt. Auth., Inc. v. Allen, 269 S.W. 3d 852 (Ky. 2008)
[142] Pickering v. Bd. of Educ. of Township High Sch. Dist., 391 U.S. 563 (1968) (citing Garrison v. State of Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375, (1962)).
[143] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, (1977).
[144] See v. City of Elyria, 502 F.3d 484, (6th Cir. 2007); Graham v. City of Mentor, 118 F. App'x 27 (6th Cir. 2004); Chapel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564 (6th Cir. 1997)

Plaintiffs' speech interests and that they would have reached the same decision even in the absence of the protected conduct."

The District Court's decision was vacated and the case remanded.

FIRST AMENDMENT

Briner v City of Ontario (OH)
2010 WL 1141152 (6th Cir. 2010)

FACTS: The opinion provides a lengthy discussion of the facts of the case (23 pages) but in summary, the Briners claimed that the police department and the city violated their First Amendment rights, destroyed their towing business and took out unwarranted criminal charges against them, as a result of actions taken by the police chief and others. The Briners had complained repeatedly in public concerning the police department and that resulted in a "sustained pattern of retaliation" against them. The District Court granted summary judgment to the defendants, and the Briners appealed.

ISSUE: Does the First Amendment provide protection when a citizen publicly criticizes law enforcement?

HOLDING: Yes

DISCUSSION: First, the Court noted that the trial court had "suggested that the Briners's complaints about the police might not even constitute the type of speech that is protected by the First Amendment." The trial court did not address the holding of Houston v. Hill, however, which held that the "First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."[145]

With respect to the retaliation allegations, the Court noted that the police refused to investigate a crime against the Briners and removed them from the tow rotation, and that they brought criminal charges because of the Briners' support of a police review commission. The Court agreed their speech, as discussed, was constitutionally protected. The injury they asserted would be of the type likely to "chill further criticism." Several items of deposition testimony supported the Briners' allegations that certain actions were taken specifically because they had been filing complaints against the department.

With respect to the malicious prosecution claim, the court noted that the Briners would be required to show that there was no probable cause to justify the arrest and prosecution. The Court looked to Ohio law, as malicious prosecution is a state claim, and noted that since the chief and other officers had agreed they were annoyed by the Briners' complaints, that a jury could conclude the "intense focus" on finding Ms. Briner guilty of a crime illustrated "a desire to find some way to punish her for her and her husband's complaints." The dismissals of misdemeanor charges that were filed resolved the prosecution in her favor, as required under Ohio law. Because there were material facts in dispute the case must go to the jury.

With respect to the question as to whether posting yard signs were a form of political speech, the Briners indicated they were threatened and harassed about the signs. "Although the Briners did not surrender and take down the signs, they were subjected to efforts at intimidation by members of the Department and have

[145] 482 U.S. 451 (1987).

alleged that they suffered some amount of anxiety, fear, and intimidation." However, since the case was being brought as a retaliation claim, the assertion that their speech was not actually abridged was immaterial, only the fact that they were intimidated, albeit unsuccessfully, by the department's actions.

The Court reversed most of the summary judgment, and returned the case for further proceedings.